REPORTS OF CASES

DECIDED IN THE

HIGH COURT OF CHANCERY,

BY THE

RT. HON. SIR LANCELOT SHADWELL,

VICE-CHANCELLOR OF ENGLAND,

AND THE

RT. HON. SIR RICHARD TORIN KINDERSLEY,

VICE-CHANCELLOR.

By NICHOLAS SIMONS,

OF LINCOLN'S INN, ESQ., BARRISTER-AT-LAW.

VOL. XVII.

CONTAINING CASES IN 1849, 1850, AND 1852;

BEING THE CONCLUDING VOLUME OF THE SERIES.

LONDON:

V. & R. STEVENS AND G. S. NORTON,

Law Booksellers and Publishers,

(*Successors to the late J. & W. T. CLARKE, of Portugal Street.*)

26, BELL YARD, LINCOLN'S INN;

AND HODGES & SMITH, GRAFTON STREET, DUBLIN

MDCCCLIV.

LONDON:
WILLIAM STEVENS, PRINTER, 37, BELL YARD,
LINCOLN'S INN.

Lord Cottenham	Lords Chancellors.
Lord Truro	
Lord St. Leonards	
Lord Langdale, Master of the Rolls	Lords Commissioners of the Great Seal.
Sir Lancelot Shadwell, Vice-Chancellor of England	
Mr. Baron Rolfe	
Sir James Lewis Knight Bruce	Lords Justices of the Court of Appeal in Chancery.
Lord Cranworth	
Lord Langdale	Masters of the Rolls.
Sir John Romilly	
Sir Lancelot Shadwell	Vice-Chancellor of England.
Sir James Lewis Knight Bruce	Vice-Chancellors.
Sir James Wigram	
Sir Robert Monsey Rolfe, afterwards Lord Cranworth	
Sir George James Turner	
Sir Richard Torin Kindersley	
Sir James Parker	
Sir John Jervis	Attornies-General.
Sir John Romilly	
Sir A. J. E. Cockburn	
Sir John Romilly	Solicitors-General.
Sir A. J. E. Cockburn	
Sir W. Page Wood	

*** The cases reported in this volume down to page 166 are reported by Mr. *Simons*. The remaining cases are edited from Mr. *Simons*' notes by Mr. *Drewry*, by whom the reports of cases determined by Vice-Chancellor *Kindersley* are continued.

A

TABLE

OF THE

CASES REPORTED

IN THIS VOLUME.

CASES IN CHANCERY,

BEFORE THE

VICE-CHANCELLOR.

SISMEY *v.* ELEY.

1849:
28th April.

Deed.
Immoral consideration.
Turpis contractus.
Particeps criminis.

The Plaintiff sought to be relieved from a deed by which he had covenanted to pay an annuity to the Defendant, a female, on the ground that the consideration for it was a promise made to him, by the Defendant, to live with him as his mistress. The Defendant demurred for want of equity. But the demurrer was overruled, because it did not appear that the Plaintiff had availed himself of the promise.

THE bill, which was filed on the 1st of March 1849, stated that, on the 6th of October 1848, the Plaintiff *George Deane Sismey* signed, sealed and delivered an instrument of that date, which was made or expressed to be made between him of the one part, and the Defendant *Louisa Rosa Eley* of the other part, and which was as follows:

"Whereas the said *Louisa Rosa Eley*, for some time heretofore, cohabited with the said *George Deane Sismey*: And whereas it was agreed, between them, *that the said cohabitation should cease*, and that the said *George D. Sismey* should, thereupon, make provision for the said *Louisa Rosa Eley*; and, in performance of the said agreement, an indenture bearing date the 19th of May 1848 and expressed to be made between the said *G. D. Sismey* of the first part, the said *L. R. Eley* of the second part, and *George Eley* of the third part, was duly executed by the said *G. D. Sismey*, whereby, for

1849.

SISMEY v. ELEY.

the consideration therein mentioned, the said *G. D. Sismey* covenanted to pay, to the said *L. R. Eley*, an annuity of 70*l.* during the joint lives of the said *G. D. Sismey* and *L. R. Eley*: And whereas all arrears of the said annuity have been duly paid and satisfied: And whereas no provision has been made for payment of certain claims upon the said *L. R. Eley* and for her support after the death of the said *G. D. Sismey*; and it hath, therefore, been proposed and agreed that the said indenture of the 19th of May 1848 should be cancelled, and that the said *G. D. Sismey* should be released from the said annuity and the covenant to pay the same; and that, in lieu and instead thereof, the said *G. D. Sismey* should advance and pay to the said *L. R. Eley*, the sum of 300*l.*, and grant to her an annuity of 100*l.*, in order that she shall, thereout, have the means of insuring the life of the said *G. D. Sismey* for her own absolute use and benefit; and it has been further agreed that the said *G. D. Sismey* shall, within twelve months from the date hereof, lay out and expend the sum of 300*l.* at least in the purchase of such a residence as the said *L. R. Eley* may approve, and to furnish the same in a respectable manner, or, in default thereof, to pay, to her, the sum of 300*l.* Now this indenture witnesseth that, in pursuance and performance of the said agreement, and in consideration of the said indenture of the 19th day of May having been cancelled and the said *G. D. Sismey* having been released and discharged, by the said *L. R. Eley*, from the said annuity of 70*l.* and from the covenant therein contained for payment of the same, he, the said *G. D. Sismey*, hath, at or before the sealing and delivery of these presents, advanced and paid, to the said *L. R. Eley*, the sum of 300*l*: And the said *G. D. Sismey* doth, hereby, covenant with the said *L. R. Eley*, that he, his heirs, executors and administrators, will pay

1849.

SISMEY v. ELEY.

or cause to be paid, unto the said *L. R. Eley*, her executors or administrators, an annuity of 100*l.* during the joint lives of the said *G. D. Sismey* and *L. R. Eley*, by four equal quarterly payments, on the 6th day of January, &c. in every year, the first quarterly payment to be made on the 6th day of January now next, if both of them shall be then living. And it is hereby also witnessed that, in further pursuance and performance of the said agreement, he the said *G. D. Sismey* doth hereby covenant with the said *L. R. Eley*, that he, his heirs, executors and administrators will, within twelve months from the date hereof, lay out and expend the sum of 300*l.* at least in the purchase of such a residence as the said *L. R. Eley* may approve of, and to furnish the same in a respectable manner; or will, in default thereof, pay, to the said *L. R. Eley*, her executors and administrators, the sum of 300*l.*"

The bill further stated that one quarterly payment of the annuity of 100*l.* became payable on the 6th of January 1849, and that the Defendant had applied, to the Plaintiff, for payment thereof, and she threatened and intended to bring an action, against him, on the covenant for payment of that annuity: That the indenture of the 6th of October 1848 was void at law, *by reason of the same having been executed, by the Plaintiff, for an illegal and immoral consideration, the Plaintiff having been induced and drawn in, by the Defendant, to execute the same by the promise and expectation made and held out to him, by her, that, if he would execute it, she would live with him as his mistress in unlawful cohabitation; and such promise and expectation was, in fact, the consideration for the execution, by the Plaintiff, of the last-mentioned indenture:* That such unlawful consideration did not appear on the face of the inden-

1849.

SISMEY v. ELEY.

ture, and the same was valid at law: that, on the 6th of October 1848, the Plaintiff paid, to the Defendant, the 300*l.* mentioned in the indenture of October 1848, and that that sum was so paid by him partly in consideration of the indenture of May 1848 having been delivered up to be cancelled, and, partly, in consideration of such future unlawful cohabitation: That the indenture of May 1848 was likewise, itself, illegal and void, the same having been made in consideration of unlawful cohabitation: That the Plaintiff was induced to execute the said indentures by the wiles and artifices of the Defendant, who was a person of unchaste and dissolute life, and, before her connection with the Plaintiff and *after such connection terminated*, had lived in unlawful cohabitation with various persons.

The bill prayed that it might be declared that the indenture of October 1848 was void, and that it might be delivered up, by the Defendant to the Plaintiff, to be cancelled; and that the Defendant might be restrained from commencing any action on that indenture or the covenants therein contained.

The Defendant demurred for want of equity.

Mr. *Rolt* and Mr. *Brett*, in support of the demurrer, said, first, that a person circumstanced as the Plaintiff was, could not, according to any principle of either justice or morality, be entitled to relief in a Court of Equity; for he sought to be relieved from the covenant in the deed of October 1848, on the ground of its being *turpis contractus*; but, according to his own showing, the turpitude was common both to him and the Defendant, and, therefore, he did not come into Court with clean hands: secondly, that the consideration apparent

1849.

SISMEY v. ELEY.

on the face of the deed, was a good and valuable consideration, and that the Plaintiff was not at liberty to aver any consideration that was inconsistent with it, though he might aver one that was in addition to it. In support of the first branch of their argument, they relied on *Batty* v. *Chester* (*a*), and cited *Gray* v. *Mathias* (*b*), *Smyth* v. *Griffin* (*c*), *Matthew* v. *Hanbury* (*d*), and *Franco* v. *Bolton* (*e*): and, in support of the second branch, they referred to *Peacock* v. *Monk* (*f*), *The King* v. *The Inhabitants of Cheadle* (*g*), and *Clifford* v. *Turrell* (*h*).

The *Vice-Chancellor*.—In this case, the Plaintiff is seeking, not to support the deed, but to impeach it.

Mr. *Bethell* and Mr. *Archibald Smith* appeared to support the bill; but

The VICE-CHANCELLOR, without hearing them, said

The instrument of October 1848 appears, on the face of it, to be good. But the Plaintiff alleges that it is void at law by reason of its having been executed, by him, for an illegal and immoral consideration; he having been induced and drawn in, by the Defendant, to execute it, by the promise and expectation made and held out to him, by the Defendant, that, if he would execute it, the Defendant would live with him, as his mistress, in unlawful cohabitation; and that such promise and expectation was, in fact, the consideration for the execution, by the Plaintiff, of the last-mentioned indenture.

(*a*) 5 Beav. 103.
(*b*) 5 Ves. 246.
(*c*) *Ante*, Vol. XIII., page 285.
(*d*) 2 Vern. 187.
(*e*) 3 Ves. 368.
(*f*) 1 Ves. sen. 127.
(*g*) 3 Barn. & Adol. 833.
(*h*) 1 Youn. & Coll. C. C. 138, see 149.

1849.

SISMEY v. ELEY.

Now it does not appear that the Plaintiff has done any illegal or immoral act in consequence of the promise and expectation made and held out to him by the Defendant: but, on the contrary, it appears that the connection between him and the Defendant terminated on the execution of the deed; and, therefore, I do not see why this Court should not interfere on his behalf.

Demurrer overruled.

1849: 24th and 25th May.

Guardians of the poor. Poor-rate.

The guardians of the poor of *Southampton* restrained from paying, out of the poor-rates, the expenses incurred by them in making an unsuccessful application, to Parliament, for an Act to authorize them to rate the owners instead of the occupiers of small tenements.

THE ATTORNEY-GENERAL *v.* THE GUARDIANS OF THE POOR OF SOUTHAMPTON.

BY a local Act of Parliament passed, in the 13th Geo. III., for better regulating the poor within the town and county of the town of *Southampton*, it was enacted that the Guardians of the poor within that town and county (who were thereby incorporated,) should, at their quarterly meetings, rate and assess and raise by taxation of every occupier or renter of any houses or lands within the town and county, such sums of money as they should think necessary for defraying the expenses of repairing, fitting up, altering and enlarging the workhouse and keeping the same in repair, or for the purchasing, erecting, repairing or finishing any other workhouse or workhouses, and for paying the interest of any money to be by them borrowed, *and for defraying the expenses of the current quarter*, and for or towards paying off the principal money so to be borrowed as in the Act mentioned: that, when the sums so assessed should be received, the overseers should pay the same to the treasurer to the board of Guardians; and that the said

1849.

THE ATT.-GENERAL v. THE GUARDIANS OF THE POOR OF SOUTHAMPTON.

rates and assessments should be levied on the persons thereby directed to pay the same, in such manner as the rates made for the relief of the poor were directed to be levied by an Act passed in the 43rd Eliz., intituled "An Act for the Relief of the Poor," or by any subsequent Act or Acts relating to the relief of the poor: that it should be lawful for the overseers, out of the moneys to be collected by them as aforesaid, to pay the county rate for the town and county, as they had theretofore done out of the rates made by them for the relief of the poor; and that all sums which, by any law then in being, were directed to be paid out of the rates collected for the relief of the poor, should, from and after the passing of the Act, be paid out of and remain a charge upon the rates to be collected under it.

In October 1848 the Guardians resolved that it was expedient to apply for an Act, in the then next session of Parliament, authorizing and requiring them to rate and assess the owners instead of the occupiers of dwelling-houses or tenements, the yearly rent or value of which should not exceed 12*l.*; and that it should be referred to a committee consisting of seven of the Guardians, to superintend and direct the passing of the Bill through Parliament, and that any three of them should be and were thereby empowered and authorized to draw on the treasurer to the board, for the amount of such expenses as the clerk might certify to be required to be advanced and paid for that purpose. In November 1848 a public meeting of the inhabitants of the town and county of the town of *Southampton*, was convened by the mayor, on the requisition of one hundred and thirty-three of the rate-payers, at which it was resolved that the application intended to be made, to Parliament, by the Board of Guardians, to alter the mode of assessment to the poor-

1849.

THE ATT.-GENERAL v. THE GUARDIANS OF THE POOR OF SOUTHAMPTON.

rate, was inexpedient, and that, if carried into effect, it would be prejudicial to the best interests of the town in general; and that a committee should be appointed to call upon the promoters of the measure to withdraw all further proceedings in the matter, and, in the event of their refusing to do so, that such committee should have power to offer a most strenuous opposition to the Bill in both Houses of Parliament. The Guardians, however, introduced a Bill into Parliament pursuant to their resolution: but, before they took that step, one of them wrote a letter to the Poor-Law Commissioners, in the following words: "As a guardian of this incorporation, I have ascertained that we lose, to the poor-rate, 2800*l.* a year from excused rates on dwelling-houses assessed at from 8*l.* to 20*l.* We are, therefore, desirous of obtaining a local Act, as in many other places similarly circumstanced, to assess the owners instead of the occupiers of these small tenements. Our Board of Guardians has resolved that such a measure is necessary; but several of them, being owners of this very property, are bent upon neutralizing that decision, by refusing to apply for an Act to give effect to it. The question stands for decision next Friday; and as its result will very much depend upon your answer to the following inquiry, I beg, earnestly, to solicit the favour of it by or before that day: Whether your honourable Board would sanction, so that the same may be allowed by the district auditor,* the expenditure which may be incurred by the

* See 11 & 12 Vict. c. 91, to make provision for the payment of parish debts, the audit of parochial and union accounts and the allowance of certain charges therein. The third section of that Act is as follows: "And whereas, in many cases, sums of money expended by officers or other persons, on behalf or for the benefit of unions and parishes, without legal authority, have not been allowed by the auditors,

1849.

THE ATT.-GENERAL v. THE GUARDIANS OF THE POOR OF SOUTHAMPTON.

Board of Guardians of this incorporation, in soliciting a private Act for the purpose of assessing the owners

---

though the guardians of the unions and the rate-payers of the parishes interested, have been willing and desirous that such sums should be paid out of the funds of those unions or parishes respectively, and great loss, in consequence of such sums not being allowed, has been sustained by individuals; and it is desirable that power should be given for the relief of such persons under certain circumstances: Be it therefore enacted that, if any person since the passing of the Act of the fifth year of the reign of his late Majesty, intituled "An Act for the Amendment and better Administration of the Laws relating to the Poor in *England* and *Wales*" and before the passing of this Act, have advanced or expended money on behalf and for the benefit of any union or parish, without having had due legal authority for such advance or expenditure, and the same shall not have been allowed in the accounts of the union or of the parish on behalf of which it has been expended or advanced, and the major part of the guardians of such union or parish, or the rate-payers of such parish in vestry assembled, as the case may be, shall express their consent to the reimbursement of such sum of money out of the funds of the union or parish so interested, the commissioners aforesaid may, if they think fit, by their order authorize the reimbursement of such sum of money by the guardians of the union or parish, or the overseers of the parish, as the case may require, in such manner as the said commissioners shall deem most advisable, so, however, that, if the same be not repaid at once, it shall be repaid by equal annual instalments not exceeding five; and all payments subsequently made in conformity with such order but not otherwise, shall be allowed, by the auditor, in the accounts of the guardians, overseers, or other officers who shall make the payment in obedience to such order: Provided always that nothing herein contained shall apply to authorize the repayment of any sum of money which has been paid on any other account than that of the relief of the poor, or in respect of some matter chargeable upon or connected with the poor-rate."

The fourth section is as follows: "And be it enacted that,

1849.

THE ATT.-GENERAL *v.* THE GUARDIANS OF THE POOR OF SOUTHAMPTON.

instead of the occupiers of small tenements within its limits." The Poor-Law Commissioners returned the following answer: "Where Acts of Parliament have been obtained for the purpose of making landlords liable to be assessed to the poor-rate in respect of property of small annual value, there have been, almost invariably, inserted in them clauses making the costs and expenses, incurred in procuring the Act, a charge upon the poor-rates raised after its passing. As the principle is one fully recognised by the Legislature, which has passed numerous Acts to enforce it, particularly in towns and cities, the Board do not anticipate that any opposition would be successful against an Act for such a purpose in the case of *Southampton*, if the proceedings be duly and correctly carried on."

The Bill introduced into Parliament as before mentioned, recited that the number of small tenements in *Southampton* had greatly increased since the passing of the Act of Geo. III.; that the rates assessed on those tenements, were rendered, in a great measure, unpro-

---

where any appeal shall be made to the said commissioners against any allowance, disallowance or surcharge made by any auditor in the accounts of any guardians, overseers or other officers, it shall be lawful for the said commissioners to decide the same according to the merits of the case; and, if they shall find that any disallowance or surcharge shall have been made or shall be lawfully made, but that the subject-matter thereof was incurred under such circumstances as make it fair and equitable that the disallowance or surcharge should be remitted, they may, by an order under their seal, direct that the same shall be remitted, upon payment of the costs, if any, which may have been incurred by the auditor or other competent authority in the enforcing of such disallowance or surcharge."

ductive by reason of the inability of the occupiers to pay the same; and that it was expedient that better provision should be made for the rating of such tenements and the collecting of such rates: and it contained a clause making the expenses of obtaining the intended Act payable out of the rates levied under the Act of Geo. III.

The opposition to the Bill was successful, notwithstanding a majority, in value, of the rate-payers petitioned Parliament in favour of it; and it was thrown out, by the House of Commons, on the 19th of February 1849.

On the 7th of March 1849 the information was filed, at the relation of one of the inhabitants of *Southampton*. After stating that the Guardians had determined to pay the expenses of preparing, promoting and prosecuting the Bill, out of the money raised by them under the Act of Geo. III.; it charged that, such an application of the money, was illegal and contrary to the intent and meaning of the Act, and was a breach of trust on the part of the Guardians: and it prayed that they might be restrained from applying the money towards defraying the expenses of preparing, promoting or prosecuting the Bill.

The injunction was obtained *ex parte*. The Defendants now moved to dissolve it.

Mr. *Rolt* and Mr. *Giffard*, in support of the motion, referred to the 15th and 46th sects. of the 4th & 5th Will. IV. c. 76 (for the Amendment and better Administration of the Laws relating to the Poor) and to the 32nd sect. of the 7th & 8th Vict. c. 101 (for the further

1849.

THE ATT.-GENERAL v. THE GUARDIANS OF THE POOR OF SOUTHAMPTON.

Amendment of the Laws relating to the Poor) and also to the 3rd and 4th sects. of the 11th & 12th Vict. c. 91. They said, first, that the application to Parliament had been supported by the majority, in value, of the rate-payers, and had been sanctioned by the Poor-Law Commissioners: that, by the 11th & 12th Vict. c. 91, the latter were made the only competent authority to decide as to the propriety of paying the expenses of the application, out of the poor-rates: that the Court, by granting the injunction, had violated, if not repealed the Act; for, as the question could not be brought before the Poor-Law Commissioners unless the Guardians were allowed to make the payment, the Court, by restraining the Guardians from making it, had prevented the Commissioners from exercising the power which the Legislature had given them. Secondly, that the expenses in question were expenses of the current quarter; and, therefore, the Guardians were authorized, by the Act of Geo. III., to defray them out of the poor-rates. They cited *Bright* v. *North* (*a*).

The *Vice-Chancellor*.—In that case the question was whether the Defendants, being trustees, were not justified in resisting a measure which they, *bonâ fide*, considered to be injurious to the trust-property.

Mr. *Renshaw* appeared for the Treasurer to the Board of Guardians.

Mr. *Bethell* and Mr. *Willcock*, for the Relator, relied on *The Attorney-General* v. *The Corporation of Norwich* (*b*).—Their arguments were adopted by the Court in giving judgment.

(*a*) 2 Phill. 216.

(*b*) *Ante*, Vol. XVI. page 225.

1849.

THE ATT.-GENERAL v. THE GUARDIANS OF THE POOR OF SOUTHAMPTON.

The VICE-CHANCELLOR:

If this Court is satisfied that a payment is not a fair and equitable payment, the Court will exercise its jurisdiction and restrain it.

The question is, whether it is not sufficiently manifest, from the facts of this case, that the thing which the information alleges to be intended to be done by the Board of Guardians, is unfair and inequitable. I cannot consent to give up jurisdiction over that question, to any other tribunal, unless an Act of Parliament has expressly taken it away. And I must say that, in my opinion, such a question as this, is not a question on which the Poor-Law Commissioners could properly decide.

There is, clearly, no authority whatever for doing the proposed act. The Poor-Law Commissioners have not only not intimated that they would allow it; but have pointed out the only means which occurred to them as the means by which it could be allowed; namely, the having an express authority by an Act of Parliament: and, as the parties who are sought to be restrained by the injunction, so framed their Act of Parliament as to take from the legislature, if they could get it, the power of raising the expenses of prosecuting the Act, out of the monies received by them under the authority of their first Act, it appears to me to be a concluded case. So far as there can have been a legislative declaration upon the subject by the course which has been adopted by the House of Commons, we have it in this case. The House of Commons did not think it right to pass an Act of Parliament which has, for its substantive recital, that it was expedient that better provision should be made for the rating of small houses and tenements

1849.

THE ATT.-GENERAL v. THE GUARDIANS OF THE POOR OF SOUTHAMPTON.

within the town and county of the town of *Southampton;* the better method being that which is detailed in the body of the Act. This was brought before the only branch of the Legislature which, according to the usual course of things, it could be brought before; and the House of Commons thought proper to reject the Bill. Therefore I have what is equivalent to a legislative declaration that this was not a matter that was expedient. Then, if it was not expedient that the Bill should be passed, and if the parties themselves, all along, acted upon assumption that they could not have the expenses of the Act even if it did pass, unless there was an express provision, in the Act, to that effect, it seems to me to be quite idle to talk about taking the opinion of the Commissioners upon the point; which opinion, to a certain extent, the Court is now in possession of.

My opinion, therefore, is that the only order I can make, is to refuse this motion with costs.

IN THE MATTER OF THE INDIA AND AUSTRALIA STEAM-PACKET COMPANY,

AND

IN THE MATTER OF THE JOINT-STOCK COMPANIES WINDING-UP ACT, 11 & 12 VICT. c. 45.

1849: 28th May.

Joint-stock Companies Winding-up Act. Jurisdiction. Injunction. Debtor and creditor.

After a creditor of a Joint-stock Company had commenced proceedings in the Lord Mayor's Court, to attach the funds of the Company in the hands of its bankers, an order was made for winding up its affairs.

Held, nevertheless, that the Court had no jurisdiction to restrain the creditor.

ON the 4th of May 1849, an order was made, on the petition of *C. Yates* and *R. Ford*, two of the directors, for dissolving and winding up the affairs of the Company: but, before that order was made, *J. Causton* and *S. Jones*, two creditors of the Company, caused an attachment to be issued, out of the Lord Mayor's Court, against the funds of the Company in the hands of their bankers, for the sum of 528*l.* which they alleged to be due to them. On the 15th of May, at which time neither an official nor an interim manager of the property of the Company had been appointed, *Yates* and *Ford* obtained an injunction, *ex parte*, restraining *Causton* and *Jones* from further proceeding with their suit in the Lord Mayor's Court.

Mr. *Bethell* and Mr. *Jessel* now moved, on behalf of *Causton* and *Jones*, to dissolve the injunction, on the ground that the Court had no jurisdiction, under the Act, to grant the injunction, and that there was no analogy between a proceeding under the Act and a common creditor's suit. They relied on the 58th section of the Act, which is set forth in the judgment.

Mr. *Rolt* and Mr. *Hetherington*, in opposition to the

1849.

IN THE MATTER OF THE INDIA AND AUSTRALIA STEAM-PACKET COMPANY.

motion, referred to the 19th, 20th, 29th, 61st, 73rd, and 118th sects. of the Act, and said that, on the 24th of May, an interim manager of the property of the Company was appointed, and that, under the 20th sect., the appointment of an interim manager was equivalent to the appointment of an official manager. They added that, as the Court had authority to order the affairs of the Company to be wound up, it must have jurisdiction to prevent its order from being frustrated and the provisions of the Act from being rendered nugatory, as they would be if the proceedings taken by *Causton* and *Jones* in the Lord Mayor's Court, were allowed to go on.

The VICE-CHANCELLOR:

All special injunctions must either stand or fall according to the merits which they possessed at the time when they were granted.

I remember that, when Mr. *Hetherington* applied to me for the injunction, he stated to me the substance of the case, and also that the greatest number of these companies was in London: and, as I had never had my attention particularly called to the provisions of this Act of Parliament, I did not feel sufficient confidence to say that this Court had not jurisdiction to grant the injunction: and, as I did not think that any harm could arise from it, I granted the application. But on looking at the Act now, I do not think that this Court has jurisdiction. The language of the 58th section of the Act, is very strong. It enacts: "That, except as is by this Act expressly provided, nothing in this Act contained nor any petition or order under the same for the dissolution and winding-up or for the winding-up of any company, shall extend or enlarge, diminish, prejudice or in anywise alter or affect the rights or remedies of cre-

ditors or other persons not being contributories of the Company, or the rights or remedies of creditors being also contributories, but being creditors of the Company upon a distinct and independent account, whether against the Company or against any of the contributories of the same, nor the rights or remedies of the Company against any contributories or other persons; nor shall alter or affect any contracts or engagements entered into, by or with the Company or any person acting on behalf of the same, previously to any such petition; nor any actions suits or other proceedings pending at the date of such petition."

I do not find that there is any express enactment in the Act, which applies to the case of a creditor suing in the Lord Mayor's Court; or that there is anything that makes the Act apply, except the circumstance that an interim manager has been appointed. That, however was not done until after the injunction was granted. It seems to me that the 19th section, which prohibits the directors, after the making of an order absolute for winding up the affairs of a company, from paying or otherwise disposing of any of the monies or property of the Company otherwise than by the direction of the *Master*, applies to the case of a voluntary payment, and not to a payment which they are compelled to make by process of law. I think also that there is not enough in this Act to justify an application for an injunction on the supposed analogy between a creditor's suit and an order under this Act.

Motion refused with costs to be paid by *Ford* and *Yates*.*

* See the next case.

1850: 3rd July.

Joint-stock Companies Winding-up Act. Jurisdiction. Injunction. Debtor and creditor.

The Court has no jurisdiction to restrain a creditor of a Joint-stock Company from suing one of the members, on the ground that an order has been made for winding up the affairs of the Company.

IN THE MATTER OF THE JOINT-STOCK COMPANIES WINDING-UP ACTS 1848 AND 1849 (11TH & 12TH VICT. c. 48, AND 12TH & 13TH VICT. c. 108),

AND

IN THE MATTER OF THE DOVER AND DEAL RAILWAY AND CINQUE PORTS, THANET, AND COAST JUNCTION RAILWAY COMPANY.*

THIS was a motion for an injunction to restrain Messrs. *Causton* and *Jones* from proceeding with an action which they had brought, against Lord *Londesborough*, in the Court of Common Pleas, for the recovery of the sum of 126*l.* 5*s.* 6*d.* The motion was intended to be made before the *Vice-Chancellor* of *England;* but, owing to the illness of that learned judge, it was heard by *Vice-Chancellor Knight Bruce.* The affidavit in support of it, stated that the action was brought for goods sold and delivered and work done, by *Causton* and *Jones*, for Lord *Londesborough*, in the matter of the Railway Company: that the Company was provisionally but not completely registered under 7th & 8th Vict. c. 110: that his Lordship was sued, by reason of his having been one of the provisional committee of the Company and for a debt due from the Company: that the action was commenced on the 5th of January 1850: that the declaration was delivered on

* *Ex relatione.*

1850.

IN THE MATTER OF THE DOVER AND DEAL RAILWAY COMPANY.

the 21st: that Lord *Londesborough* pleaded to it on the 23rd; since which issue had been joined by the Plaintiffs, who gave notice of trial on the 25th of January: that, on the 11th of that month, a petition was presented to the *Lord Chancellor*, marked before the *Vice-Chancellor* of *England*, by one *James*, a contributory to and member of the Company, for the purpose of winding up the affairs of the Company: that, on the 25th of that month, his Honour ordered the affairs of the Company to be absolutely wound up under the provisions of the Winding-up Acts 1848 and 1849, and referred it to the *Master* of the Court in rotation to wind up the same; and that, on the 5th of February 1850, the *Master* appointed one *Croysdell* to be an official manager of the Company. The affidavit further stated that, Mr. Justice *Coleridge*, by an order made in the action and dated the 28th of March 1850, ordered that all further proceedings in the action should be stayed until after proof or the exhibiting or making of such proof of their debt, before the *Master*, as *Causton* and *Jones* might be able to make, under the 73rd sect. of the Winding-up Act, 1848: that *Causton* and *Jones* had exhibited such proof; and, on the 8th of May 1850, the *Master* certified that they had done so: that, on the 13th of the same month, *Causton* and *Jones* took out a summons, before a Judge at chambers, to show cause why they should not be at liberty to proceed to trial in their action: that, by an order of the Judge dated the same day, they were allowed to proceed to trial: that the *Master* was about settling the list of contributors to the debts and liabilities of the Company under the order of the 25th of January 1850: that Lord *Londesborough* was one of such contributories, and, as such, would be placed on the list: that there were no assets of the Company in his hands or available, to him, to pay

1850.

IN THE MATTER OF THE DOVER AND DEAL RAILWAY COMPANY.

or meet the debt; and that the amount of it, if recovered, and the costs of the action, must be borne by him out of his private funds.

An affidavit, made in opposition to the motion by the attorney for *Causton* and *Jones*, stated that the action was brought against Lord *Londesborough*, as being a director, member and contributory of the company, and as personally liable, at law, to the payment of the 126*l.* 5*s.* 6*d.*, by reason of the orders and instructions given, and the active part taken, by him, in the conduct and management of the affairs of the Company: that the deponent when he applied, to the *Master*, for his certificate, stated that the application was made for the purpose of enabling *Causton* and *Jones* to proceed with their action, and not for the purpose of obtaining payment of the 126*l.* 5*s.* 6*d.* out of the funds of the Company; and that the *Master* granted the certificate, expressly, to enable them to proceed to the trial of their action.

Mr. *Hislop Clarke*, with whom was Mr. *Bethell*, moved for the injunction. He referred to the 19th, 20th, 58th, 73rd, 74th, 75th, 82nd, 91st and 118th sects. of the 11th & 12th Vict. c. 45.

Mr. *Lloyd* and Mr. *Jessel* opposed the motion on the ground that the Court had no jurisdiction, under either of the Acts, to grant it. They referred to the 52nd sect. of the 11th & 12th Vict. c. 45.

The *Vice-Chancellor* refused the motion with costs.

IN THE MATTER OF THE TRUSTS OF THE WILL OF LAURA THRUSTON, DECEASED.

1849: 29th May.

Vesting. Will. Construction.

Testatrix directed the trustees of a fund (over which she had a power of appointment,) and the survivor of them, his executors, administrators and assigns, *to pay, assign or transfer the same to* R. M. *in trust for* his daughter, to be vested in her on attaining the age of twenty-one or day of marriage, which should first happen, and the interest and dividends thereof to accumulate *for her benefit*, and be paid to her with the principal, at the time before-mentioned.

The daughter died under age and unmarried.

Held that she did not take a vested interest in the fund.

A PETITION presented by *Ann Morgan*, widow, under the Act for better securing Trust Funds and for the Relief of Trustees (10th & 11th Vict. c. 96) stated that *Laura Thruston*, widow, by her will dated the 18th of June 1823, bequeathed her personal estate to *John Thruston* and *William Malton*, their executors, administrators and assigns, upon trust, to set apart and appropriate the sum of 500*l.*, and invest the same in the funds, and to stand possessed thereof upon the trusts thereinafter mentioned concerning the same; and to lay out the residue of her personal estate in the funds, and to stand possessed thereof in trust for the petitioner during her life, and after her decease, in trust for the testatrix's nieces *Julia Morgan* and *Laura Morgan*, equally, as tenants in common. And, as to the 500*l.* and the funds upon which it should be invested, in trust to pay the dividends thereof to *Sophia Henshaw* for life, and, after her decease, in trust to transfer the capital to such person or persons as *Sophia Henshaw* should, by her will, appoint, and, in default of such appointment, to stand possessed thereof upon the same trusts as were thereinbefore declared with respect to the residue of the testatrix's personal estate and the securities in which such residue should be invested.

The petition next stated that the testatrix died on the 26th of October 1827, leaving the petitioner and *Sophia Henshaw*, *Julia Morgan*, and *Laura Morgan*

1849.

IN THE MATTER OF THE TRUSTS OF THE WILL OF LAURA THRUSTON, DECEASED.

her surviving: that *Thruston* and *Malton*, in execution of the trusts of her will, invested the 500*l.* in the purchase of 501*l.* 7*s.* 10*d.* Consols, in their names: that *Sophia Henshaw*, by her will dated the 11th of October 1831, after reciting Mrs. *Thruston's* will so far as it related to the 500*l.*, continued in the words and figures following: "Now I, the said *Sophia Henshaw*, in pursuance and in exercise and execution of the power or authority contained in the said hereinbefore recited will of the said *Laura Thruston*, and of all other powers or authorities enabling me in that behalf, do, by this my last will and testament in writing, direct and appoint that the said *John Thruston* and *William Malton* and the survivor of them, his executors, administrators and assigns, do and shall *pay, assign or transfer the same unto the Rev.* Robert Moore, *upon trust for* his daughter, Grace Harriet Moore, *to be vested in her on attaining the age of twenty-one years or day of marriage*, which shall first happen; and I direct the interest and dividends of the said sum to accumulate *for her benefit and be paid to her, with the principal thereof, at the time before mentioned*: and I hereby appoint the said *Robert Moore* executor of this my will."

The petition next stated that Mrs. *Henshaw* died in February 1837; that *Grace Harriet Moore* died in March 1847, *under* twenty-one *and unmarried*, leaving her father her sole next-of-kin, and that he had procured letters of administration of her personal estate to be granted to him; that *Thruston* and *Malton* had invested and accumulated the dividends of the 501*l.* 7*s.* 10*d.* Consols which accrued due after Mrs. *Henshaw's* decease, and had recently transferred the Consols and 182*l.* 4*s.* 11*d.* like stock which had arisen from the investment and accumulation of the dividends thereof,

1849.

IN THE MATTER OF THE TRUSTS OF THE WILL OF LAURA THRUSTON, DECEASED.

into the name of the *Accountant-General* under the before-mentioned Act of Parliament.

The petition prayed that the 182*l.* 4*s.* 11*d.* Consols might be declared to be subject to the trusts declared, by Mrs. *Thruston's* will, of the income of her residuary personal estate, and that the same might be transferred to the petitioner; and that the 501*l.* 7*s.* 10*d.* Consols might be declared to be subject to the trusts declared, by Mrs. *Thruston's* will, of her residuary personal estate, and that the dividends which might accrue due thereon after the transfer of the 182*l.* 4*s.* 11*d.* might be paid to the petitioner during her life.

Mr. *Bethell* and Mr. *Baily* for the petitioner.

Under Mrs. *Henshaw's* will, the 500*l.* was to be vested in *Grace Harriet Moore* on her attaining twenty-one or marrying, and the accumulations of the interest and dividends of that sum were to be paid to her at the same time. She, however, died under age and without having been married; and, therefore, the appointment made in her favour, did not take effect. The consequence is that the 500*l.* became subject to the trusts declared, by Mrs. *Thruston's* will, of her residuary personal estate, and, under those trusts, the petitioner is entitled to the fund which has arisen from the accumulation of the dividends of the stock in which the 500*l.* has been invested, and also to the dividends to become due on that stock during the remainder of her life: *Glanvill* v. *Glanvill* (*a*).

The *Vice-Chancellor.*—Mrs. *Henshaw* directs *Thruston* and *Malton* to pay, assign and transfer the 500*l.* to

(*a*) 2 Mer. 38.

1849.

IN THE MATTER OF THE TRUSTS OF THE WILL OF LAURA THRUSTON, DECEASED.

the Rev. *Robert Moore* in trust for his daughter; therefore, there is a gift to her in the first instance.

Mr. *Humphry*, for *Julia* and *Laura Morgan*, said that Mrs. *Henshaw* had expressly directed that the 500*l.* should vest in *Grace Harriet Moore*, that is, that she should take a vested interest in that sum, on her attaining the age of twenty-one or marrying; and that there was nothing, in the will, to control that positive direction; and, therefore, in the event that had happened, *Julia* and *Laura Morgan* were entitled to the principal of the 500*l.* under Mrs. *Thruston's* will, and, the petitioner was entitled, under that will, to the fund which had arisen from the accumulation of the dividends of that sum; for the accumulations were to be paid to *Grace Harriet Moore* in the event and only in the event of her becoming entitled to the principal: *Russel* v. *Buchanan* (*b*), *Comport* v. *Austen* (*c*), *The Attorney-General* v. *Malkin* (*d*), *Packham* v. *Gregory* (*e*), *Knight* v. *Knight* (*f*), *Blease* v. *Burgh* (*g*), and *Bull* v. *Pritchard* (*h*).

Mr. *Cooper*, for the Rev. *Robert Moore*, said that, by the words: "to be vested in her," Mrs. *Henshaw* meant "to be paid, assigned and transferred to her:" and that she had directed the interest and dividends to be accumulated for the benefit of *Grace Harriet Moore*: but, if the arguments which had been addressed to the Court, were to prevail; the interest and dividends would have

(*b*) *Ante*, Vol. VII., page 628.
(*c*) *Ante*, Vol. XII., page 218, see page 246.
(*d*) 2 Phill. 64.
(*e*) 4 Hare, 396.
(*f*) 2 Sim. & Stu. 490.
(*g*) 2 Beav. 221.
(*h*) 5 Hare, 567, see 572.

accumulated, not for her benefit, but for the benefit of another person. He cited *Saunders* v. *Vautier* (*i*), and *Lister* v. *Bradley* (*k*).

The VICE-CHANCELLOR:

Mr. *Baily*, the case is with you.

The only question is, whether the words "to be vested in her," are to have their natural import, or are to be considered as identical with the words "to be paid to her." Now it appears, plainly, that the testatrix, Mrs. *Henshaw*, knew that there was a difference between those two expressions: for she directs *Thruston* and *Malton* to pay, assign or transfer the 500*l.* to Mr. *Moore*, in trust for his daughter, to be vested in her on her attaining twenty-one or marrying. Then she directs the interest and dividends of the 500*l.* to be accumulated for her benefit and to be paid to her, with the principal, at the time before-mentioned. By which she meant that the principal and the accumulations of interest, should vest in Miss *Moore* at a given time, and that then, and not till then, the whole should be paid to her. But, as Miss *Moore* neither attained twenty-one nor married, the appointment has, entirely, failed, and the trust declared, by the first will, in default of appointment, has taken effect. Therefore I shall declare that the petitioner is entitled to the fund which has arisen from the accumulation of the interest of the 500*l.*, and also to the interest which shall accrue on that sum during her life; and I shall give liberty to the parties interested in the principal, to apply on her death.

(*i*) Craig & Phill. 240. (*k*) 1 Hare, 10.

1849:
29th May
and
5th June.

Portions.
Settlement.
Construction.

By a marriage settlement dated in 1787, 1000*l.*, the wife's property, was vested in trustees, in trust for the wife and her husband, for

JEFFERY *v.* JEFFERY.

BY an indenture dated the 19th of July 1787, and made between *Margaret Williams*, spinster, daughter of *Moses Williams*, of the first part; *William Jeffery* of the second part, and the said *Moses Williams*, and *Mark Grigg* and *William Kevern* of the third part, being the settlement made in contemplation of the marriage which was shortly afterwards solemnized between *William Jeffery* and *Margaret Williams*; after reciting that, in prospect of the intended marriage, it had been agreed, between the parties thereto, that the sum of 1000*l.* their lives, successively, and, after their several deceases and the death of the survivor of them, in case there should be any child or children of the body of the husband or the body of the wife lawfully begotten which should be then living, in trust to pay the 1000*l.* unto such children, equally, and, if there should be but one such child living, then in trust for such only child, and to be paid to such child or children at their respective ages of twenty-one, and, in the mean time the interest of each child's share to be applied for its maintenance; and, in case there should be no such child living at the death of the survivor of the husband and wife, or in case of there being such and all of them should die before they should attain twenty-one, then the 1000*l.* to be in trust for the wife's father. By a deed dated in 1793, the wife's father made a voluntary settlement of leaseholds and 500*l.* stock, in trust for the wife for life, remainder in trust for all her children then born or thereafter to be born who should be living at her decease, equally, and to be assigned and paid to them at their respective ages of twenty-one, and, in the mean time, the income to be applied for their maintenance; and, if any of them should die before their shares should become payable or assignable, their shares to go to the survivors; and, in case all the children should die under twenty-one, the property to be in trust for the settlor. The husband and wife had three children. The wife survived the husband. Two of the children died in her lifetime; one of them having attained twenty-one. The third attained twenty-one and survived the wife.

Held that that child was entitled to the whole of the property comprised in the deeds.

£4. per Cent. Annuities to which *Margaret Williams* was entitled, should be transferred, by her, to *Moses Williams*, *Mark Grigg*, and *William Kevern*, upon the trusts and for the intents and purposes therein and hereinafter mentioned; and that *Margaret Williams*, in pursuance of the said agreement, had, before the day of the date of indenture, transferred the 1000*l.* stock to *Moses Williams*, *Mark Grigg* and *William Kevern*: It was declared and agreed by and between all the parties thereto, that the 1000*l.* stock was so transferred to them in trust, after the marriage, to pay the dividends thereof to such person or persons, &c., as *Margaret Williams* should during her life appoint, and in default of such appointment, in trust to pay the same into her proper hands for her separate use; and, after her decease, in case *William Jeffery* should survive her, in trust to pay the dividends to him, during his life; and, after the several deceases of *Margaret Williams* and *William Jeffery* and the death of the survivor of them, in case there should be any child or children of the body of the said *William Jeffery*, on the body of the said *Margaret* lawfully begotten, *which should be then living*, then upon this further trust, that they the said *Moses Williams*, *Mark Grigg*, and *William Kevern* their executors, administrators or assigns should pay, apply and dispose of the said 1000*l.* stock, and the dividends or produce thereof, unto and among *such* child or children, equally to be divided between them, share and share alike; and, if there should be but one *such* child living, then in trust for such only child, and to be paid or assigned, to such child or children, at his, her or their respective age or ages of twenty-one years, and, that, in the mean time, the dividends, interest or produce of all and every such child's or children's part, should, from time to time, at the discretion of the trustees, their executors or administrators, be paid and

1849.

JEFFERY v. JEFFERY.

applied for and towards the education and maintenance of such child or children; and, if any of the said children should die before their parts or shares of and in the said stock should become payable, then that the parts and shares of him, her or them so dying, with the dividends or interest thereof from the death of such child or children respectively, should go, belong and be paid or assigned to the survivor or survivors of such child or children, when and as their respective parts or shares should have become due and payable, and, in case there should be no such child or children *living at the time of the death of the survivor of them the said* Margaret Williams *and* William Jeffery, or in case of there being such and all of them should die before any of them should attain the age of twenty-one years, it was thereby declared and agreed, by and between all the parties thereto, that the 1000*l.* stock, and the dividends and interest thereof should from thenceforth, be and remain to and for the use of such person or persons, &c., as *Moses Williams* should appoint, and in default of such appointment, in trust for his executors or administrators.

By an indenture dated the 29th of January 1793, and made between *Moses Williams* of the one part, and *Mark Grigg* and *William Kevern* of the other part, *Moses Williams*, in consideration of the natural love and affection which he had for *Margaret* the wife of *William Jeffery* and her children, assigned certain hereditaments in the town of *Plymouth Dock* which he held for the remainder of a term of ninety-nine years, and also a policy of insurance for 200*l.* on the life of *Elizabeth Johnson*, to *Grigg* and *Kevern*, in trust as soon as conveniently might be after they should receive the 200*l.*, to place out the same in the public funds or on good freehold security at interest, in their names, and to pay

the clear rent of the leasehold premises and the dividends of the 200*l.* to such person or persons, &c., as *Margaret Jeffery* should, during her life, appoint; and, in default of such appointment, in trust to pay the same into her proper hands for her separate use; and he declared that, after the decease of *Margaret Jeffery*, the leasehold premises and the 200*l.* should be upon trust for all and every her child and children then born or thereafter to be born, *and which should be living at the time of her decease*, equally to be divided between the said children, share and share alike, and to be assigned or paid unto them at their respective ages of twenty-one years, and, in the mean time, the rents, dividends, interest and produce thereof to be paid and applied, from time to time, at the discretion of the said trustees, towards the maintenance and education and for the use and benefit of the said children; and if any of the said children should die *before their respective parts or shares of and in the premises should become payable or to be assigned as aforesaid*, that then the parts or shares of such child or children so dying should go, belong and be paid or assigned to the survivors or survivor of them, when and as their respective parts or shares should have become due and payable; and in case all such children should die before any one of them should attain the age of twenty-one years, then upon trust for such person or persons, &c. as *Moses Williams* should appoint, and, in default of such appointment, in trust for his executors or administrators.

Elizabeth Johnson died in 1796; and shortly afterwards *Grigg* and *Kevern* received a sum of money, under the policy, with which they purchased 509*l.* Four per Cents. in their joint names.

1849.

JEFFERY v. JEFFERY.

William Jeffery died in 1796, leaving his wife, *Margaret Jeffery*, surviving. They had three children, namely *William Williams Jeffery*, *Mary Jeffery*, and *Moses Williams Jeffery*. *William Williams Jeffery* died under twenty-one. *Mary Jeffery* attained twenty-one, and died in 1833. *Margaret Jeffery* died in 1846.

The bill was filed, in March 1848, by *Moses Williams Jeffery* against *Charles Jeffrey*, who was the personal representative of *Mary Jeffery*, and against *John Pike Jeffery*, who then held the two sums of 1000*l.* and 509*l.* stock and the leasehold hereditaments in the town of *Plymouth Dock*, upon the trusts of the indentures of July 1787 and January 1793. It stated that the Plaintiff was the only child of *Margaret Jeffery* living at her death, and that by virtue of the limitations contained in the indentures of July 1787 and January 1793, the Plaintiff, on the death of *Margaret Jeffery*, became and then was absolutely entitled, in his own right, to the entirety of the trust-premises; and it prayed that *John Pike Jeffery* might be decreed to transfer and pay, to the Plaintiff, the two sums of stock and the dividends which had arisen thereon since the decease of *Margaret Jeffery*, and to assign to him the leasehold hereditaments.

Charles Jeffery's answer stated that he was advised that each of the children of *Margaret Jeffery* who attained twenty-one, acquired, on attaining such age, under and by virtue of the limitations contained in the indentures of July 1787 and January 1793, a vested interest in the Bank Annuities and leasehold hereditaments subject to the trusts of such indentures; and

that, accordingly, on the death of *Margaret Jeffery*, the Plaintiff became entitled to one moiety of the sums of stock and leasehold hereditaments, and that the Defendant, on taking out administration to his late wife, *Mary Jeffery*, became and then was entitled to the other moiety.

The Cause now came on to be heard.

Mr. *Malins* and Mr. *Willcock*, for the Plaintiff, said that it was quite clear, from the language of the limitation in the deed of 1787 to the children of *William Jeffery* and *Margaret* his wife, that no child could claim the benefit of that limitation, unless it survived both its parents; and that there was no inconsistency between the language of that limitation and the language of the gift over; that the same remarks applied, with still greater force, to the deed of 1793, the language of which was, if possible, more free from doubt than the language of the deed of 1787. They referred to *Howgrave* v. *Cartier* (*a*), *Fitzgerald* v. *Field* (*b*), *Hotchkin* v. *Humfrey* (*c*), *Denn* v. *Bagshaw* (*d*), *Newman* v. *Newman* (*e*), *Russel* v. *Buchanan* (*f*), *Festing* v. *Allen* (*g*), *Whatford* v. *Moore* (*h*), *Woodcock* v. *Duke of Dorset* (*i*).

(*a*) 3 Ves. & Beam. 79.
(*b*) 1 Russ. 416, see 438.
(*c*) 2 Madd. 65.
(*d*) 6 T. R. 512.
(*e*) *Ante*, Vol. X., page 51.
(*f*) *Ante*, Vol. VII., page 628, and 2 Cromp. & Mees. 561.
(*g*) 5 Hare, 573, and 12 Mees. & Wels. 279.
(*h*) 3 Myl. & Craig, 270; and *ante*, Vol. VII., page 574.
(*i*) 3 Bro. C. C. 569; see 3 Ves. & Beam. 82, note (*c*).

1849.

JEFFERY v. JEFFERY.

Mr. *Rolt* and Mr. *Dickinson* appeared for *John Pike Jeffery*.

Mr. *Bethell* and Mr. *Baggallay*, for *Charles Jeffery*, said that the deed of 1787 was a marriage settlement, and that, if it appeared to be the intention of the parties to an instrument of that nature that every child of the marriage who attained twenty-one should have a portion, the Court would give effect to that intention, although there were words in the instrument which seemed to make the rights of the children contingent on their surviving their parents: *Hope* v. *Lord Clifden* (*k*), *Woodcock* v. *The Duke of Dorset:* and they contended that the words: "*such* child or children," in the deed of 1787, meant, not the child or children who should be living at the death of the survivor of *William* and *Margaret Jeffery*, but "the child or children of the body of *William Jeffery* on the body of *Margaret* lawfully begotten."—With respect to the deed of 1793, they said that the words: "and which shall be living at the time of her decease," were not, of necessity, to be construed as limiting the comprehensiveness of the preceding words: "all and every the child and children of the said *Margaret Jeffery* now born or hereafter to be born:" and that, as the shares of the children were directed to be assigned and paid to them at their respective ages of twenty-one years and were not to go over to the survivor or survivors, unless they died before their shares became payable, that is, before they attained twenty-one, the children who attained twenty-one, took an absolute, vested interest on attaining that age. They added that the gift over to such person or persons

(*k*) 6 Ves. 499, see 508, 509.

as *Moses Williams* should appoint, was not to take effect if one child attained twenty-one, though that child might die before its mother: *Perfect* v. *Lord Curzon* (*l*).

The VICE-CHANCELLOR:

The deed of 1793 differs, materially, from the deed of 1787: for, first it is only a voluntary declaration of trust. Secondly, the property comprised in it, was not the father's or the mother's, but the grandfather's; and, thirdly, the words: "and which shall be living at the time of her decease," form part of the description of the child or children who were to take under the original gift; and the word, 'such,' in the subsequent part of the deed, refers to them. Therefore, the Plaintiff is entitled to the whole of the property comprised in the deed of 1793.

Mr. *Willcock*, in his reply, upon the construction of the deed of 1787, cited *Bright* v. *Rowe* (*m*).

The VICE-CHANCELLOR:

In this case the 1000*l.* stock which was settled by the deed of 1787, was the property of the intended wife: but I cannot see anything, in that deed, which points out, as a taker, a child who should not be living at the several deceases of the husband and wife and the death of the survivor of them. Besides, the settlement provides that, in case there should be no such child or children *living at the time of the death of the survivor of the husband and wife*, the 1000*l.* should go as the grandfather should appoint: therefore, the husband and wife

(*l*) 5 Madd. 442. (*m*) 3 Myl. & Keen, 316, see judgment.

1849.

JEFFERY v. JEFFERY.

and their children, were not the sole objects of the settlement.

My notion is that there is nothing in this deed which allows me to introduce the doctrine in *Woodcock* v. *The Duke of Dorset;* but that I must take the words as I find them. And, therefore, I shall declare that the Plaintiff is entitled to the 1000*l.* stock as well as to the property comprised in the settlement of 1787.

1849: 31st May.

Production of documents. Privileged communications.

Letters alleged, by a Defendant, to have passed between him and his solicitor, in the course of and for the purpose of professional business, which the solicitor was employed to transact for him; and a case alleged to have been professionally and confidentially submitted, to counsel, by the solicitor of the Defendant and on his behalf, and the opinion thereon, held not to be privileged. But a case alleged to have been submitted, to counsel, by the Defendant's solicitor, in contemplation of legal proceedings and with reference to the title of the Defendant at issue in the present suit, and the opinion thereon, held to be privileged.

BEADON *v.* KING.

IN 1808, certain lands of which a prebendary was seised in right of his prebend, were sold under the Land-tax Redemption Act, (42 Geo. III. c. 116,) and purchased by the prebendary in the name of a trustee. Afterwards the prebendary and his trustee conveyed part of the lands to different purchasers, and the remainder, to his son, voluntarily. The prebendary died in 1827. His immediate successor resigned in 1833, and was succeeded by the Plaintiff.

The bill was filed in 1848, against the son and the personal representatives of the first-mentioned prebendary, to set aside the sale and conveyance of 1808, and to recover the lands remaining unsold and the monies

produced by the sale of such part of the lands as had been sold, on the ground that the sale of 1808 was made for an inadequate consideration, and was not authorized by the Land Tax Redemption Act. The son's answer, after negativing the grounds on which the bill impeached the sale, admitted (in answer to the usual charge) that he had, in his possession, drafts of the conveyances to the purchasers, of the parts of the lands which had been sold; several letters which had passed between him and his late father and their solicitors; and three cases laid before their Counsel, one in 1827, another in 1833, and the third in 1847, with the opinions thereon; but he submitted that he ought not to be compelled to produce any of those documents, because the drafts related, exclusively, to the titles of the several purchasers of the land sold, and the Plaintiff had no common interest nor any interest whatever in those documents; because the letters were written in the course of and for the purpose of professional business which the solicitor was employed to transact for the Defendant and his father; and because the cases of 1833 and 1847 were laid before Counsel by the solicitor and on behalf of the Defendant, in contemplation of legal proceedings and with reference to the title of the Defendant at issue in the present suit; and because the case of 1827 was confidentially and professionally submitted, to Counsel, by the solicitor of the Defendant and on his behalf.

Mr. *Bethell* and Mr. *Bazalgette*, for the Plaintiff, now moved for the production of all the before-mentioned documents. They cited *Greenlaw* v. *King* (*a*) and *Flight* v. *Robinson* (*b*).

Mr. *Rolt* and Mr. *Heberden*, for the Defendant,

(*a*) 1 Beav. 137. (*b*) 8 Beav. 22.

1849.

BEADON v. KING.

relied on *Herring* v. *Clobery* (c) and *Reece* v. *Trye* (d). They referred also to *Holmes* v. *Baddeley* (e), *Woods* v. *Woods* (f), *Pearse* v. *Pearse* (g), and *Peile* v. *Stoddart* (h).

Mr. *Bethell* replied.

The VICE-CHANCELLOR:

The case made by the bill is this. In June 1808, the then incumbent of the prebend, by an instrument purporting to be made under the authority of the Land Tax Redemption Act, conveyed certain lands belonging to the prebend, to a trustee for himself. He died in 1827. His immediate successor vacated the benefice in 1833; and then the Plaintiff was appointed to it. And he has filed this bill, against the representatives of the first-mentioned prebendary, for the purpose of recovering, from his personal estate, the monies produced by the sales of the lands sold under the authority of the deed of 1808: and the first question is whether the drafts of the conveyances to the purchasers, ought to be produced.

Now, I admit that, if the purchasers had an interest in those drafts, or if the sales to them were attempted to be impugned, it would not be right to order the production of the drafts. But no such thing is attempted: all that the Plaintiff seeks, is to recover the produce of the sales from the estate of the vendor; and he asks for the production of the drafts with a view to obtaining that relief. In such a case, it appears to me to be quite plain that the drafts, and even the conveyances them-

(c) 1 Phill. 91.
(d) 9 Beav. 316.
(e) 1 Phill. 476.
(f) 4 Hare, 83.
(g) 1 De Gex & Smale, 12.
(h) 1 Hall & Twells, 207; and 1 Mac Naght. & Gordon, 192.

selves if they were in the possession of the Defendant, ought to be produced.

Next, with respect to the letters. I do not see any statement, in the answer, which shows that they are privileged communications, and, therefore, ought not to be produced; because they are not alleged to have been written with respect to any question between the Defendant and those who represented the prebendal estate at the time. All that is said respecting them, is that they were written, by the Defendant and his father, to a gentleman who was their solicitor, or, by the latter, to the former; and that the solicitor was employed, professionally, as the solicitor of the Defendant and his father, to transact professional business; and that all the letters were confidential communications which passed, between them, in the course and for the purpose of that business: but we are left entirely in the dark as to what that business was. One can however easily understand that letters of that description, might pass between the Defendant and his father and their solicitor, relating to the sales to the different purchasers, without, at all, relating to the question whether the Plaintiff or some future prebendary, might not have a right to impeach the transaction of 1808. It seems to me that the statement in question, is nothing more than a statement that the Defendant has, in his possession, letters relating to the property; therefore they ought to be produced.

Lastly, with respect to the cases and opinions. The answer avers that the case of 1833 was stated, to Counsel, by the Defendant's solicitor and on his behalf, and that the opinion thereon was given in contemplation of legal proceedings and with reference to the title of

1849.

BEADON v. KING.

the Defendant at issue in the present suit; and the same sort of language is made applicable to the case and opinion of 1847: and, therefore, it is but reasonable to infer that the former related to legal proceedings which were threatened at the time, and that the latter related to the present suit, which was instituted in 1848; and therefore neither the one nor the other, ought to be produced. But there is no such averment with respect to the case of 1827. All that is said with regard to it, is that it was professionally and confidentially submitted, to Counsel, by the solicitor of the Defendant and on his behalf. That is very general: and it seems to me that the alteration in the language used with respect to that case and the other two, was premeditated; and that it shows that the Defendant, himself, was fully aware that there was a distinction between them.

My opinion is that the cases and opinions of 1833 and 1847 are protected, but that all the other documents ought to be produced.

1849: 2nd June.

Injunction. Practice.

Injunction granted, summarily, to restrain actions brought, by the Defendant in a suit, after decree; the bringing of the actions being inconsistent with the spirit of the decree.

THE GRAND JUNCTION CANAL COMPANY *v.* DIMES.

AT the hearing of this Cause, reported *ante*, Vol. XV. page 402, an injunction, by which the Defendant, his agents, servants and workmen were restrained from, in any manner, stopping, impeding or obstructing, or causing to be stopped, impeded or obstructed the passage of boats, barges or other vessels along the *Grand Junction* Canal, or from, in any manner, hindering the navigation of the Canal, or damaging or injuring, or causing to be damaged or injured the Canal or the banks thereof, or

the towing path of the same, was made perpetual; and the decree was affirmed by the *Lord Chancellor*, on appeal. Afterwards, *Dimes* brought fifteen actions of trespass, against the Company, on account of the same number of barges having passed along that part of the Canal which flowed over the land to which the suit related.

A motion was now made on behalf of the Company, without any new bill being filed, for an injunction to restrain the actions.

Mr. *Stuart*, Mr. *James Parker* and Mr. *Busk*, supported the motion on the ground that the bringing of the actions was a violation of the spirit of the decree: and they cited *Casamajor* v. *Strode* (*a*) and *Dene* v. *Abell* (*b*) in order to show that the Court ought to grant the injunction without a bill being filed for it.

Mr. *Daniel* and Mr. *Smythies*, for *Dimes*, contended that the Company ought to have filed a supplemental bill praying for the injunction, before they moved for it.

Mr. *Randell* appeared for another party.

The *Vice-Chancellor* said that it was plain, on the face of the decree, that the object and intention of it was to settle, finally, the question between *Dimes* and the Company; but that *Dimes*, by bringing the actions, was re-opening the question, and, therefore, was violating the spirit of the decree.

Injunction granted, but without costs.

(*a*) 1 Sim. & Stu. 381. (*b*) Seton on Decrees, 423.

1849:
8th June.

Infants.
Partition.

In a suit for partition, it appeared that the estate was vested, as to one moiety, in *A.* in fee, and, as to the other moiety, in *B.* in fee, but in trust for infants.

Held that a conveyance from *B.* and the decree of the Court, would give *A.* a good title to the tenements allotted to him; and, therefore, that it was not necessary to order the infants to convey when they came of age.

COLE *v.* SEWELL.*

THIS was a suit for a partition of several freehold estates in the county of *Surrey*, which came on for further directions on the certificate of partition of the Commissioners.

It appeared, by the *Master's* report made in pursuance of the decree, (whereby it was referred to him to inquire and state what shares the Plaintiff and the Defendants were respectively entitled to in the estates,) that the Plaintiff *Francis Sewell Cole* was seised in fee, to his own use, of one undivided moiety, and that the Defendant *George Rush* was seised in fee of the other undivided moiety, in trust for the Defendant *T. B. B. D. H. Sewell* for life, and after his decease, in trust for all his children who should be living at the time of his decease and their respective heirs and assigns, and for the issue who should be living at the time of his decease of any of his children who should have died in his lifetime leaving issue at the time of his decease, and the heirs and assigns of such issue.

Some of the children had died leaving issue, who were infants and Defendants in the suit.

Mr. *Rolt* and Mr. *Shebbeare*, for the Plaintiff, submitted to the Court whether it was necessary that the *cestuis que trust* should join in the conveyance; in which case it would be proper that the infants should be

* *Ex relatione.*

1849.

COLE
v.
SEWELL.

ordered to convey when they came of age; or whether a conveyance from the Defendant *Rush*, the trustee, in whom the legal estate in the second mentioned moiety was vested, would confer a sufficient title on the Plaintiff as respected that moiety.

Mr. *Lloyd* and Mr. *Hislop Clarke* for the Defendants.

The VICE-CHANCELLOR:

The decree of the Court will bind the equitable interests, and the Plaintiff will have a conveyance of the legal estate from the trustee. It is, therefore, unnecessary that the *cestuis que trust* should join in the conveyance, and the order need not contain a direction for the infants to execute when of age.

CRADOCK *v.* PIPER.
PARKINSON *v.* PIPER.

1849:
8th and 9th
June.

Costs.
Solicitor.
Trustee.

THE testator in these Causes died in 1830, having appointed *John Watson*, who was his solicitor, and three other gentlemen, the trustees and executors of his will; and all of them proved it.

One of the trustees of a will, was a solicitor, and acted, in that character, for his co-trustees and some of the other parties to a suit relating to the testator's property.

The first Cause was instituted by legatees under the will, and the second, by two of the simple-contract creditors of the testator. In both Causes the trustees of the will and the parties beneficially interested under it were Defendants; and *Watson* acted *as solicitor in the Causes, not only for himself and his co-trustees, but also*

Held that his bills of costs ought to be allowed in taxing costs under orders in the suit.

1849.

CRADOCK v. PIPER.

PARKINSON v. PIPER.

for some of the other Defendants. By the order on further directions in the second suit, dated the 30th of April 1839, the *Master* was directed to tax the costs of all the parties to that suit; (the costs of the Defendants, *as between solicitor and client,*) and the consideration of further directions and subsequent costs, and of the payment of the costs thereby directed to be taxed, was reserved until the *Master* should have made his report. Under that order, the costs of the Defendants were taxed in the same manner as they would have been if *Watson* had not been a solicitor: and the taxation was not objected to by any of the parties to the suit; and, on the 4th of June 1847, an order was made, in both the Causes, by which the subsequent costs of all parties were directed to be taxed, (the costs of the Defendants, as between solicitor and client,) and to be added to the costs taxed under the Order of April 1839. Under that order, the same allowances were made to the *cestuis que trust* who had employed *Watson* as their solicitor, as they would have been entitled to if *Watson* had not been a trustee of the will; but, in taxing the costs of the trustees, *all charges in respect of matters of business personally transacted by* Watson *as their solicitor in the suits, were disallowed,* on the ground that he was a trustee; and only the sums which he had actually disbursed, were allowed.

Two petitions, one presented by *Watson* and alleging that the charges which had been disallowed in taxing the costs of the trustees, ought to have been allowed; and the other presented by the *cestuis que trust*, and alleging that, in taxing their costs, *Watson's* charges for business done as their solicitor, ought not to have been allowed, now came on to be heard.

1849.

CRADOCK v. PIPER.
PARKINSON v. PIPER.

Mr. *Bethell* and Mr. *Sidebottom* appeared for *Watson*.

Mr. *James Parker* and Mr. *Wright*, for the *cestuis que trust*, cited *New* v. *Jones* (*a*), *Moore* v. *Frowd* (*b*), *Fraser* v. *Palmer* (*c*), *Bainbrigge* v. *Blair* (*d*), and *Carmichael* v. *Wilson* (*e*).

Mr. *Stuart* and Mr. *Milne* appeared for other parties.

The *Vice-Chancellor* held that the charges made in respect of business done, by *Watson*, as solicitor for the trustees and the *cestuis que trust*, ought to have been allowed; first, because their costs were directed to be taxed *as between solicitor and client*, which words, he considered, did, of necessity, imply that *Watson*, though he was a trustee, was to be paid for his trouble; and, secondly, because none of the parties had objected to charges of the same nature being allowed, when the costs were taxed under the order of April 1839: and he dismissed the petition of the *cestuis que trust*, with costs; and made an order, on *Watson's* petition, referring it back, to the *Taxing Master*, to review his taxation.

On the *cestuis que trust* appealing, to the *Lord Chancellor*, from the *Vice-Chancellor's* Orders, his Lordship, though he disapproved of the grounds of his Honour's decision, dismissed the appeal-petitions with costs; it being admitted, as his Lordship's Order stated, that none of the costs in *Watson's* bills mentioned, were incurred

(*a*) 9 Jarman's Conveyancing, Sweet's edit. 73.
(*b*) 3 Myl. & Craig, 45.
(*c*) 4 You. & Coll. Eq. Ex. 515.
(*d*) 8 Beav. 588.
(*e*) 2 Molloy, 537.

1849.

CRADOCK v. PIPER.

PARKINSON v. PIPER.

or charged on behalf of *Watson* exclusively; and it appearing that the costs in the said bills mentioned, incurred or charged on behalf of *Watson* and his co-trustees and the other Defendants for whom he acted as solicitor in the suits, were not, in any manner, increased by his appearing or acting for himself and them jointly, beyond what they would have been if he had acted for them solely.*

* See 1 Hall & Twells, 617; and 1 Macnaght. & Gordon, 664.

1849: 12th June.

Jurisdiction. Vice-Chancellor of England.

The *Vice-Chancellor* has no jurisdiction to discharge, for irregularity, an order made, as of course, at the Rolls, though in a suit attached to his own Court.

STUART *v.* STUART.†

MOTION, in a suit attached to the *Vice-Chancellor of England's* Court, to discharge, for irregularity, an order which had been made, as of course, on petition at the Rolls.

Mr. *F. T. White* moved.

Mr. *Pole* opposed.

The *Vice-Chancellor* considered that he had no jurisdiction to discharge the order, and refused the motion with costs (*a*).

† *Ex relatione.*

(*a*) See *St. Victor* v. *De-vereux*, 6 Beav. 584; and *Watts* v. *Penny*, 11 Beav. 435; and see next case.

WATTS *v.* PENNY.*

1849: 12th June.

Costs. Cross Bill of discovery. New Orders. Jurisdiction. Practice.

A bill for relief and a cross bill of discovery filed by the Defendant to it, were attached to the *Vice-Chancellor of England's* Court. The original bill was afterwards transferred to and heard by the *Vice-Chancellor Knight Bruce*, who dismissed it without costs. But the *Lord Chancellor*, on appeal, reversed the decree, directed issues, and reserved the costs. The answer to the cross bill was not put in until after the original hearing, and was not used at the hearing of the appeal.

Held that the *Vice-Chancellor of England* had jurisdiction to dispose of the costs of the cross suit.

AN original suit for relief, and a cross suit for discovery in aid of the defence to that suit, were, both of them, attached to the *Vice-Chancellor of England's* Court. The original suit was, afterwards, transferred to *Vice-Chancellor Knight Bruce*, who heard it and dismissed the bill without costs. At that time, the answer in the cross suit, was not put in, but, afterwards, the Plaintiff in that suit called for the answer, and it was put in on 30th January 1849. The Defendant in the cross suit then obtained an order, at the Rolls, as of course, for the costs of that suit, but that order was afterwards discharged, by the *Master of the Rolls* (*a*).

The *Lord-Chancellor*, on appeal, reversed the decree in the original suit, and directed certain issues, and reserved the costs of that suit (*b*). The answer in the cross suit was not made use of at the hearing before the *Lord Chancellor*.

The Defendant in the cross suit, now moved that the Plaintiff in it, might be ordered to pay him the costs of it.

* *Ex relatione.*

(*a*) See *Watts* v. *Penny*, 1 Beav. 435.

(*b*) See *Penny* v. *Watts*, 1 Macnaght. & Gordon, 150.

1849.

WATTS v. PENNY.

Mr. *Bethell* and Mr. *Bazalgette* in support of the motion.

We are compelled to make this application to this Court, as it is the Court in which the bill was filed. The *Master of the Rolls* thought that, by the General Orders, it was taken out of his jurisdiction, and that the order must be obtained from the judge in whose jurisdiction the suit was. The answer was called for after the original Cause had been disposed of, and, under the 125th Order of May 1845 (*c*) which supersedes the 41st Order of August 1841, the Court has a discretion as to costs, which it will exercise by giving the Defendant the costs of these unnecessary proceedings.

Mr. *Rolt* and Mr. *Rogers*, *contra*.

These costs must be payable either by an order of course, or by an order made by the judge who has heard the original Cause and has a discretion. The case either does or does not fall within the General Order. If it does not, the costs in question are payable at once, as of course, under the old rule: if it does fall within that order, they must abide the event of the original suit, unless the judge who heard that suit has otherwise directed. The old rule was that the costs of a bill of discovery, were paid, of course, to the Defendant. That was altered by the 41st Order of 1841 which left the question entirely to the discretion of the Court. The 125th Order of May 1845 makes the costs, costs in the original cause, unless the Court otherwise orders, but such an order must be made at the hearing, and not on an independent application like this, which, in fact, amounts to hearing

(*c*) Beav. Ord. 335.

the merits on a motion. We come under the 125th Order of 1845; and the Court has made no order to the contrary: *Robinson* v. *Wall* (*d*): and the *Lord Chancellor*, by his decree, has expressly reserved the costs: *Westfield* v. *Skipworth* (*e*).

The VICE-CHANCELLOR:

Both in the Orders of 1841 and of 1845, there is necessarily involved the supposition that the Court has jurisdiction both in the original suit and cross suit: and that state of things would have existed provided the original Cause had been allowed to remain before me. But the effect of transferring that Cause, was that the *Vice-Chancellor Knight Bruce* had power to hear the original Cause, but had not any jurisdiction over any Cause that remained before me. Under those circumstances he could have no discretion with respect to the answer and the costs in the cross Cause; and, for that reason, he had not, under the Orders, power of deciding on the point; and it was impossible, in such a case, for him to exercise any discretion. Then, as to the 125th Order of 1845, I remember there was some point about it argued before me, on which occasion I could not help making this observation in my copy of the Orders: that the Order of 1845 does not, expressly, discharge the Order of 1841. It may do so in fact, but it does not do so in terms. There is, I know, a General Order that so much of the former Orders as are inconsistent with these, should be discharged; but there is no express abrogation, in the Order of 1845, of this Order of 1841. Then what is the Order of 1845? It says that the costs of a bill of discovery filed by any Defendant to a bill for

(*d*) 10 Beav. 73.
(*e*) *Ante*, Vol. XIII. page 265; and 1 Phill. 277.

1849.

WATTS v. PENNY.

relief, are to be costs in the original Cause, unless the Court otherwise orders. Now what Court is it that is to order otherwise? It is a Court which has jurisdiction both with respect to the Cause which is in hearing before it, and with respect to the Cause in which the bill of discovery is filed. But, if there is a severance of jurisdiction, it seems that, of necessity, the Order of 1845 cannot be made applicable to the case, for the Judge hearing the original Cause, can exercise his discretion only upon what was done in the Cause before him, and can exercise no discretion as to the costs of a bill of discovery which remains in this Court.

Neither do I think that the order made in this suit by the *Lord Chancellor*, is applicable; because what I understand he has done, is to make a decree directing issues and to reserve the consideration of costs. But of what costs? Why those which came under the consideration of *Vice-Chancellor Knight Bruce*. I cannot suppose that the *Lord Chancellor* was dealing with the costs of a bill of discovery of which he never heard one word.

And, that being so, and the case not being provided for by the Orders of 1845, it, of necessity, requires to be mentioned to the Court; and I shall order the costs of the cross Cause to be paid by the Plaintiff in it.

SHADBOLT *v.* THORNTON.

1849: 22nd June.

Charity. Mortmain. Leaseholds.

A testatrix possessed of leaseholds and pure personalty, left the whole of her property to her brother. Her pure personalty was more than sufficient to pay her debts and funeral and testamentary expenses. Her brother died nine days after her, having left the whole of his property to charities. His executors took out administration to the testatrix and sold the leaseholds. Held that the charities were entitled to the proceeds under his will.

A TESTATRIX died in January 1847, having appointed her brother her universal legatee and executor. Her property consisted of pure personalty and of leaseholds. Her brother, whose own property was pure personalty, died nine days after her, without having proved her will, and without leaving any next-of-kin. By his will, he bequeathed pecuniary legacies to two charities, and the residue of his property to other charities; and appointed three persons his executors. All of them proved his will; and two of them took out letters of administration, *cum testamento annexo*, to his sister. Notwithstanding her pure personalty was more than sufficient to pay her debts and funeral and testamentary expenses, her administrators sold her leaseholds in April 1847.

At the hearing of a suit instituted, by the brother's executors, for the administration of his estate,

Mr. *Wray*, for the *Attorney-General*, contended that, as the leaseholds remained unsold at the brother's death, and as it was not necessary to sell them for payment of the sister's debts and funeral and testamentary expenses, the residuary bequest in the brother's will, was void as to them; and, as he had left no next-of-kin, the Crown was entitled to the proceeds of them.

Mr. *Bethell*, Mr. *James Parker*, Mr. *Amphlett*, Mr. *De Gex*, Mr. *Baggallay*, Mr. *Smythe*, Mr. *Marett*, Mr.

1849.

SHADBOLT v. THORNTON.

Leach and Mr. *Nichols* were the other Counsel in the Cause.

The *Vice-Chancellor* disallowed the claim made on behalf of the Crown, saying that it was the duty of the lady's administrators to sell the leaseholds; and that the right of her brother's executors, was to have the surplus of the proceeds, after paying her debts and funeral and testamentary expenses, handed over to them; and that the leaseholds must be considered as impressed with that character which they would have borne if the lady's administrators had performed their duty.

1849: 25th June.

Affidavits. Practice.

On an appeal from a *Master's* order to enlarge publication, affidavits, not used before the *Master*, cannot be read.

PARKYN *v.* CAPE.

ON the hearing of a motion made, *by way of appeal* from an order to enlarge publication, made by one of the *Masters* of the Court under 3 & 4 Will. IV. c. 94, s. 13,

The *Vice-Chancellor* ruled that, the *Master* having made an order, and the application now made being, according to the language of the Act, *on appeal*, affidavits which had not been used before the *Master*, could not be read.

Mr. *Bethell* and Mr. *Kinglake* moved.

Mr. *Stuart* and Mr. *Prior* opposed.

BENYON *v.* NETTLEFOLD.

1849: 2nd July.

Discovery. Particeps criminis. Immoral consideration. Turpis contractus.

THE bill, which was filed on the 12th of June 1849, stated that, in the month of December 1847, the Plaintiff indiscreetly executed an indenture dated the 14th of that month, and made between the Plaintiff of the first part, *Caroline Nettlefold*, spinster, of the second part, and the Defendants *J. P. Beavan* and *William Nettlefold*, the father of *Caroline*, of the third part, which, after reciting that the Plaintiff, being desirous to make a provision for *Caroline Nettlefold*, had lately agreed, with *Beavan* and *William Nettlefold*, to grant an annuity of 200*l.* to be paid to her during her life, witnessed that, in pursuance of the agreement and in consideration of 10*s.*, the Plaintiff granted and covenanted to pay an annuity of the specified amount to *Beavan* and *William Nettlefold*, in trust for *Caroline Nettlefold*. The bill next stated that the indenture was valid on the face of it, and that the consideration for it, as stated and appearing by the deed, was free from legal objection; but that the fact was that the consideration for the deed, was a prospective, illicit cohabitation and improper connection *subsequently had* between the Plaintiff and *Caroline Nettlefold*, and that the deed was invalid: that, after the execution of it, the Plaintiff, seeing the impropriety of the connection and finding himself duped, broke off and discontinued the connection altogether: that *William Nettlefold* well knew that the consideration for which the deed was executed by the Plaintiff was

A. covenanted with *B.* and *C.* to pay them an annuity in trust for a woman. The deed was good on the face of it; but the real consideration for it was, future illicit cohabitation, between *A.* and the woman; and that cohabitation took place, but was afterwards discontinued. *B.* and *C.* then brought an action, on the covenant, against *A.* *A.* pleaded the consideration for the deed, and filed a bill, against *B.* and *C.*, for a discovery in aid of his plea. *B.* demurred to the bill; and the demurrer was allowed on the ground that *A.* had participated in the guilt which it was the object of the deed to produce.

1849.

BENYON
v.
NETTLEFOLD.

immoral and illegal; nevertheless, he had recently, without any previous communication with *Beavan* and contrary to his wishes, commenced an action at law against the Plaintiff, in the joint names of himself and *Beavan*, to recover a half-yearly payment of the annuity alleged to have been due on the 1st of January 1849; and the Plaintiff had put in a plea to the action to the effect that the deed was executed and delivered, by the Plaintiff, to *William Nettlefold* and *Beavan*, in consideration of *Caroline Nettlefold* then agreeing, with the Plaintiff, unlawfully and immorally to cohabit and commit fornication with him, and for no other value or consideration whatsoever: that, in order to enable the Plaintiff to prove the truth of his plea and defend the action, it was necessary that the Defendants should discover and set forth whether the deed was not executed, by the Plaintiff, for some immoral consideration, and whether or not in consideration and in contemplation of a prospective or contemplated cohabitation or immoral connection between him and *Caroline Nettlefold*, and whether, at or before the execution thereof, it was not agreed, understood or implied that a future illicit cohabitation or immoral connection was to take place between them: and that the Defendants ought to set forth the real, true and *bonâ fide* consideration for the deed, and the full and true particulars of all and every the consideration given for the same, and whether an illicit cohabitation and immoral connection did not afterwards take place between the Plaintiff and *Caroline Nettlefold*; and whether the Defendants had not had conversations, with each other and *Caroline Nettlefold*, in which they had admitted the immoral consideration given for the deed and the matters thereinbefore alleged, and that the Plaintiff had been duped. The bill then stated that the Defendants, or one of them, had, in their or his possession, divers

deeds and other writings connected with, mentioning, or, in some way, referring, relating to or showing the truth of all the matters aforesaid; and it prayed that the Defendants might make a full and true discovery of all and every the matters aforesaid, and might, in the mean time, be restrained from proceeding in the action, and from commencing any other proceedings at law against the Plaintiff touching the matters aforesaid.

The Defendant, *William Nettlefold*, put in a general demurrer to the bill.

Mr. *Rolt* and Mr. *Hare* supported the demurrer on the following grounds: namely, that the discovery sought by the bill, was immaterial; because a Court of law would not receive evidence to show that the annuity was granted for an immoral consideration; and that, if a Court of law would receive such evidence, a Court of equity would not assist the Plaintiff to obtain it, as, according to his own showing, he was a party to the immorality: *Franco* v. *Bolton* (*a*); *Smyth* v. *Griffin* (*b*); and *Batty* v. *Chester* (*c*): and they distinguished this case from *Sismey* v. *Eley* (*d*), because the bill in that case sought relief as well as discovery, and because it did not appear that the Plaintiff in that case, had done any illegal or immoral act in consequence of the promise which was the consideration for his executing the deed.

Mr. *Bethell* and Mr. *Bird*, in support of the bill, said that no one could dispute that a plea, to an action brought on deed, that the deed was executed for an im-

(*a*) 3 Ves. 368.

(*b*) *Ante*, Vol. XIII., page 245.

(*c*) 5 Beav. 103; see *ante*, Vol. XIII., page 254, note.

(*d*) *Ante*, page 1.

1849.

BENYON v. NETTLEFOLD.

moral or illegal consideration, was a good defence to the action, and, in this case, the Plaintiffs at law had admitted the validity of the plea, for they had not demurred to it; and that it was a well established rule of a Court of equity, to compel a discovery of whatever constituted a valid legal defence: that there was a broad distinction between a Plaintiff and a Defendant at law applying for the assistance of a Court of equity; and that the distinction was in favour of the latter: *Albretcht* v. *Sussman* (*e*): that the trustees of the annuity, were the Plaintiffs in the action, and no knowledge of the immorality of the consideration at the time when the deed was executed, was imputed to either of them; but all that the bill alleged with respect to such knowledge, had reference to the time when the action was commenced; and they, and not *Caroline Nettleford*, were the parties from whom the discovery was sought: that Lord *Rosslyn's* decision in *Franco* v. *Bolton*, so far as it rested on the ground that, according to the received rule of pleading which had been then adopted at law, all the matter that would avoid a deed, might be made available at law, and therefore, a Court of equity would not interfere, had been expressly overruled, by Lord *Eldon*, in *Bromley* v. *Holland* (*f*); and that the other ground of that decision, did not exist in this case; for the Plaintiff sought discovery from strangers to the transaction, and not from a party to it: that the decision in *Smyth* v. *Griffin* proceeded on the ground that the fact of the securities having been executed for an immoral purpose, appeared on the face of them: that *Sismey* v. *Eley* was an authority in the Plaintiff's favour; for the Court would have sustained the bill if it had alleged, as the bill in this case did, that the Plaintiff and the lady had cohabited together after the execution of the deed.

(*e*) 2 Ves. & Beam. 323. (*f*) 7 Ves. 3, see 14.

The other cases referred to by the Plaintiff's counsel, were *Gray* v. *Mathias* (*g*), *Priest* v. *Parrot* (*h*), *Knye* v. *Moore* (*i*), *Simpson* v. *Lord Howden* (*k*), and *Hawkins* v. *Hall* (*l*).

Mr. *Rolt*, in reply, said that, in *Gray* v. *Mathias*, the bill was filed, not by a party to the transaction, but by his executor; and that that case, so far as it related to the first bond, was in favour of his client; and, so far as it related to the second bond, it had no bearing on the present case; that the statement, in the bill, that the Defendant *Nettlefold* knew that the deed was executed for an immoral and illegal consideration, must be taken to refer to the time of the execution of the deed; for an intendment was always to be made against the pleader; and that a person who became a trustee under a deed, the object of which was to secure future illicit cohabitation between a man and a woman, although the woman might not be, as she was in this case, his own daughter, was guilty of an offence against public decency, for which he might be prosecuted criminally; and that it was the invariable practice of a Court of equity not to compel a Defendant to discover anything, which might tend, in the slightest degree, to criminate himself.

The VICE-CHANCELLOR:

There is no substantial distinction between a Court of equity administering relief by way of decree, and interfering, on the application of a Plaintiff, to compel the discovery which he asks. Technically speaking there is, of course, a distinction between relief and discovery; but the principle is the same; for, it seems to me that

(*g*) 5 Ves. 286.
(*h*) 2 Ves. 160.
(*i*) 2 Sim. & Stu. 260.
(*k*) 3 Myl. & Cr. 97.
(*l*) 1 Beav. 73.

1849.

BENYON
v.
NETTLEFOLD.

the very principle which would restrain the Court from giving relief, is a principle that would also restrain the Court from giving any discovery.

I do not think it necessary, in such a case as this, to go back to the older cases; but I shall take the last two of those that were referred to: *Sismey* v. *Eley* and *Smyth* v. *Griffin*. In *Sismey* v. *Eley*, it appeared that, although there was originally an immoral purpose, yet the party who filed the bill to be relieved from the deed which he had executed, had abandoned that immoral purpose; and the act, in contemplation of which the deed was executed, had never been done. In that case, therefore, when the party filed his bill to have relief, he was in the situation of a person who had intended to do something immoral and, to a certain extent, illegal, but had refrained from doing it, and who, before he committed the crime, changed his mind and asked to be relieved. In *Smyth* v. *Griffin*, the party actually had accomplished the bad purpose to which the deed was made auxiliary, and then there was a bill filed for relief against it; and a demurrer was put in to the bill and was allowed.

The language of the *Master of the Rolls* in *Batty* v. *Chester*, appears to me to be perfectly intelligible. His Lordship says that a Court of equity would relieve against a deed which was given for an immoral purpose, provided there are circumstances existing which would constitute a ground for relief exclusive of the bad conduct of the party who asks for relief. He may have had an illicit purpose, and may have accomplished it; but still, if there are other grounds besides those on which this Court would interfere, the Court would interfere on those grounds. But the Court, as he says, will not

1849.

BENYON
v.
NETTLEFOLD.

interfere when the party who claims the relief, shows that he himself has participated in the very moral guilt which it was the object of the deed to procure. That is my interpretation of his Lordship's words.

Now in this case there is no doubt as to what the fact was; for the Plaintiff says: "That the said indenture is valid on the face thereof, and that the consideration for the same, as stated and appearing by the said deed, is free from legal objection: however, your orator shows and the fact is that the consideration for the said deed, was a prospective, illicit cohabitation and improper connexion subsequently had between your orator and the said *Caroline Nettlefold*, and that the said deed is invalid: that, after the execution of the said deed, your orator, seeing the impropriety of the said connection, and finding himself duped, broke off and discontinued the same altogether." Therefore it is perfectly plain, from the language of the bill, that the Plaintiff did participate in the very evil which the deed was intended to produce: and my opinion is that it is a case in which this Court ought not to interfere by compelling a discovery which may, more or less, tend to show that the Plaintiff's plea at law, is good.

Demurrer allowed.

1849:
3rd July.

Demurrer.
Pleading.
Practice.

The Defendant to an original bill having died after appearance but before answer, the Plaintiff filed a bill of revivor and supplement against his personal representative, praying that the personal representative might answer both bills. The personal representative demurred to both. Held that he ought to have demurred to the bill of revivor and supplement only.

GRANVILLE *v.* BETTS.

THE sole Defendant to an original bill, died after appearance but before answer. His widow was his personal representative, and the Plaintiff filed a bill of revivor and supplement against her, praying that she might answer that bill and also the original one. She put in a demurrer which, both in the title and in the body of it, purported to be a demurrer to the original bill and also to the bill of revivor and supplement. The Plaintiff set down the demurrer for argument. On its coming on to be argued,

Mr. *Bethell* and Mr. *Tripp*, for the Plaintiff, objected that, as the widow was not a party to the original bill, she was not entitled to demur to it, but ought to have headed her demurrer as a demurrer to the bill of revivor and supplement only; for, though she was called upon to answer both bills, she was cited into Court and the obligation to answer was imposed upon her by the bill of revivor and supplement only: *Phelps* v. *Sproule* (*a*).

Mr. *Stuart* and Mr. *Sparling*, for the Defendant, said, first, that the Plaintiff asked for one answer to both the bills, and therefore, it was singular for him to say that there could not be one demurrer to both of them: secondly, that he ought to have moved that the demurrer might be taken off the file, and that, as he had set down the demurrer for argument, the objection

(*a*) *Ante*, Vol. IV., page 318.

1849.

GRANVILLE v. BETTS.

to it made by his counsel, came too late. They referred to *Vigers* v. *Lord Audley* (*b*) and *Smith* v. *Bryon* (*c*).

The *Vice-Chancellor*, though he was not much in favour of the objection, held it to be good, on the ground that as the widow of the deceased Defendant was not a party to the original bill, she was not entitled to demur to it, although she was properly required to answer it; and he ordered her to pay the costs of the demurrer, and gave her leave to amend the title, but not the body of it.

(*b*) *Ante*, Vol. IX., page 408. (*c*) 3 Madd. 428.

WELLESLEY *v.* WELLESLEY.

THE COUNTESS OF MORNINGTON *v.* THE EARL OF MORNINGTON.

1849: 6th, 7th, 9th, 10th, 11th, 13th, 14th, and 21st July.

Parties. Practice. Supplemental bill.

THE bill in *Wellesley* v. *Wellesley* was filed, in May 1839, by Mrs. *Wellesley*, against her husband, and his son by a former marriage and other persons, and was afterwards amended.* Before the eldest son, whose name was *William Richard Wellesley*, had appeared to the bill, Mrs. *Wellesley* dismissed it as against him. The Cause of *Wellesley* v. *Wellesley* came on to be heard, before the *Vice-Chancellor of England*, on the 27th of February 1844, when, in consequence of an objection,

Before *A.*, who was named as a Defendant to the bill, had appeared to it, the Plaintiff dismissed the bill as against him: but, on some of the other Defendants, afterwards, insisting that he was a necessary party, the Plaintiff filed a supplemental bill, for the purpose of bringing him again before the Court. Held that the Plaintiff was entitled so to do.

* See *ante*, Vol. X., page 256; and 4 Myl. & Cr. 554, 561.

1849.

WELLESLEY v. WELLESLEY. THE COUNTESS OF MORNINGTON v. THE EARL OF MORNINGTON.

made by the answer of two of the Defendants, that *William Richard Wellesley* and certain other persons, were necessary parties to it, it was ordered to stand over, with liberty to the Plaintiff to add proper parties by either amending her original bill or filing a supplemental one. In September 1847 (at which time Mr. and Mrs. *Wellesley* had become Earl and Countess of *Mornington*, and *William Richard Wellesley* had become Lord *Wellesley*), the bill in the secondly above-mentioned suit was filed, in pursuance of the order of the 27th of February 1844. It was a bill in the nature of a supplemental one, and after alleging, amongst other things, that Lord *Wellesley* had notice of the articles of the 21st of June 1834, prior to the execution of the deed of the 15th of December in that year, it prayed, amongst other things, that the whole of the estates charged with the 462,000*l.* might be sold, and that the Plaintiff's annuity of 1000*l.* might be raised and secured.

Lord *Wellesley*, in his answer, said that at the time when the articles were executed, he was under twenty-one, and that he was, in no manner, party or privy thereto; and that neither the annuity of 1000*l.*, nor any other annuity for the benefit of the Plaintiff, was, in any manner whatever, mentioned or alluded to in his presence, during the negotiations relating to, and preceding the execution by him of the deeds of December 1834, and that no consideration was given, to him, by any person, or in any manner passed to him for granting or securing the annuity of 1000*l.* or any other annuity for the benefit of the Plaintiff. His Lordship, however, added that he had been informed and believed that Messrs. *Pyne* and *Richards* were parties to the preparing and execution of the articles as the solicitors of Lord *Mornington;* and that, previously to October 1834,

1849.

WELLESLEY v. WELLESLEY.

THE COUNTESS OF MORNINGTON v. THE EARL OF MORNINGTON.

they had been employed by Lord *Mornington* as his solicitors; and that he himself, soon after his coming of age in that month, employed them as his solicitors; and, under the circumstances set forth in his answer, he admitted that Messrs. *Pyne* and *Richards* were his and Lord *Mornington's* solicitors in preparing the deed of the 15th of December 1834; and he submitted that the Plaintiff was not entitled to the relief prayed by her.

On the Causes coming on to be heard,

Mr. *Bethell*, with whom were Mr. *Lloyd* and Mr. *Toller*, for Lord *Wellesley*, said that both the original and the supplemental suits were being heard, and, therefore, the Court, if it made any decree, must make a decree in both those suits; that the Plaintiff, instead of making Lord *Wellesley* a party to the supplemental bill, ought to have discharged the order which she had obtained for dismissing the original bill and to have made him a party to that bill; for he was brought before the Court not in respect of matter in the supplemental bill, but in respect of matter in the original bill; and that, as she had not thought proper to take that course, but had suffered the order of dismissal to remain part of the record, the Court must dismiss both the bills as against Lord *Wellesley*: *Lautour* v. *Holcombe* (*a*).

Mr. *Rolt*, Mr. *Willcock* and Mr. *Freeling* appeared for the Plaintiff.

Mr. *Malins* and Mr. *Baggallay* for Lord *Mornington*,

(*a*) *Ante*, Vol. XI., page 71. Affirmed by Lord *Lyndhurst*, C., in Easter Term, 1843.

1849.

WELLESLEY v. WELLESLEY.

THE COUNTESS OF MORNINGTON v. THE EARL OF MORNINGTON.

and Mr. *Cooper*, Mr. *Sidebottom*, Mr. *Chandless*, Mr. *Cooke*, Mr. *Martindale*, Mr. *Schomberg* and Mr. *Nalder* for other parties.

The VICE-CHANCELLOR:

It seems to me that the rule which was laid down, first of all by myself, and, afterwards, by the *Lord Chancellor*, in the case of *Wellesley* v. *Wellesley*, governs the whole case. With respect to Lord *Wellesley*, Mr. *Bethell* made an objection, which was that he was dismissed from the original bill, and afterwards made a party by a supplemental bill; and it was insisted that that ought not to be so. Now the case of *Lautour* v. *Holcombe*, which was relied upon, appears to me to be essentially different from the present case; because in the case of *Lautour* v. *Holcombe*, (which was affirmed by Lord *Lyndhurst*) the case was that a party Defendant moved to have the bill dismissed, as against him, for want of prosecution; and the order was made accordingly; and, when the Cause came on for hearing some time afterwards, it was insisted that that person ought to be made a party; and counsel asked that the Cause might stand over and that the Plaintiff might be at liberty to file a supplemental bill for the purpose of bringing the dismissed party before the Court. That I refused; and it appears to me that the case where a party to an original bill, has obtained a right to be dismissed from the suit, is essentially different from the case where the Plaintiff voluntarily dismisses the party from the suit: because the Plaintiff is not bound by his own voluntary act, but may, at any time while the state of the pleadings permits it, amend his bill and make the dismissed person a party to the suit: therefore I do not think that there is any substantial objection to a decree being made against Lord *Wellesley*, on that special ground.

1849.

WELLESLEY v. WELLESLEY.

THE COUNTESS OF MORNINGTON v. THE EARL OF MORNINGTON.

Then the rest of the case seems to me to resolve itself into mere general rules about which there is no dispute. But I should first mention that it certainly did occur to my mind as a thing to be gravely considered, whether the power which is given to Lord *Mornington* to make a jointure, was a power given to him under such circumstances that it ought to bind Lord *Wellesley:* and that mainly depends on the question whether Lord *Wellesley* can fairly be said to have had notice of the articles of June 1834 on which the Plaintiff's case mainly rests. But, upon looking into the evidence, it seems to me that, though Lord *Wellesley* has put in an answer, to a certain extent denying notice, yet that the evidence clearly shows that there was quite sufficient notice to enable the Court to act as against him. Because it is distinctly in evidence that Mr. *Pyne* was the person who, through the whole of the year 1834, acted as solicitor, first, for Lord *Mornington*, and, afterwards, for him and his son Lord *Wellesley*: and he was the solicitor who prepared the articles of June 1834.

Therefore I shall make a declaration that, under the circumstances of the case, Lady *Mornington* has acquired a right to have all the means which were put in Lord *Mornington's* power by the deeds of December 1834 acted upon, by Lord *Wellesley*, so as to carry into effect, as far as possible, the articles of June 1834: and there must be a reference, to the *Master*, to settle such conveyances and assurances as shall be necessary for that purpose.

1849.

WELLESLEY v. WELLESLEY.

THE COUNTESS OF MORNINGTON v. THE EARL OF MORNINGTON.

Declare that the articles of agreement of the 21st of June 1834, ought to be specifically performed, and decree the same accordingly; and declare that, by force and virtue of the said articles of agreement, an annuity or yearly rent-charge of 1000*l.* for her life, became and was, in equity, as and from the 14th day of November 1834, a charge, in favour of the Plaintiff, upon all the rights and interests, estates and property which were acquired by or vested in the Defendant, Lord *Mornington*, under or by virtue of the deeds of the 12th, 13th, and 15th days of December 1834: and declare that the Defendant, Lord *Mornington*, is bound to execute all proper and necessary conveyances and assurances for more effectually charging and securing the said annuity on all the rights and interests, estates and property acquired by him or vested in him under or by virtue of the said deeds of the 12th, 13th and 15th of December 1834, and to exercise all powers in anywise enabling him, under or by virtue of the said deeds or any of them, to charge the said annuity upon the estates and hereditaments comprised in the said deeds or upon any part thereof: and it is ordered that it be referred, to the *Master*, to settle and approve of the necessary conveyances and assurances for effectually charging and securing, in favour of the said Plaintiff, the said annuity of 1000*l.*, upon the rights and interests, estates and property acquired by or vested in the Defendant, Lord *Mornington*, under or by virtue of the said deeds of the 12th, 13th and 15th days of December 1834, to the extent of securing the annuity of 1000*l.*, and for the exercise, by Lord *Mornington*, of the power of appointment, by the said deed of the 11th of December 1834 given to or vested in him, of charging the said annuity upon the estates and hereditaments comprised in the said deeds or in any of them, pursuant to the declara-

tions hereinbefore contained: and it is ordered that the said Defendant, Lord *Mornington*, do execute all such conveyances and assurances as shall be so settled by the *Master*, &c.

1849.

WELLESLEY v. WELLESLEY.

BOWDEN *v.* BOWDEN.

1849: 13th July.

Leaseholds. Enjoyment in specie. Will. Construction.

JAMES BOWDEN made his will dated the 24th of December 1839, and in the following words:

"I give to my wife, *Eliza Bowden*, all my household furniture, plate, linen, china, books, trinkets and household effects, for her own use and benefit and disposal; and I give, to my said wife, the sum of 1200*l.* absolutely. I give, unto *John Marston* and my said wife, *Eliza Bowden, all my leasehold estates* and all other my estate and effects of what nature or kind soever which I may be possessed of, interested in or entitled to at the time of my decease, upon the trusts following; that is to say, upon trust that they, the said *John Marston* and my said wife, or the survivor of them or the executors or administrators of such survivor and the trustees and trustee for the time being of this my will, do and shall receive and take the *rents*, issues, dividends, and annual proceeds of all and singular my said estate and effects, and, thereout, pay to or permit and suffer my said wife to receive and retain the sum of 300*l.* *per annum* during her life, by equal quarterly payments, for her own use and benefit, free from the control of any future husband, and so as not to be subject to his debts or engagements,

Testator gave all his *leasehold estates* and all other his estate, and effects to trustees, on certain trusts for the benefit of his wife and daughters and the children of the latter; and, in declaring the trusts, he used the term, "rents," as well as dividends and annual proceeds: and he empowered the trustees of his will for the time being, to sell his leasehold estates and to invest the proceeds on mortgage of freehold or other leasehold estates, and to lease any part or parts of his said estates.

Held, in a suit to carry the trusts of the will into execution, that the leaseholds were not to be sold.

1849.

BOWDEN v. BOWDEN.

but so and in such manner that my said wife may not sell or dispose of or otherwise receive, by anticipation, such annual sum or any part thereof; and, to that end, I declare and direct that her receipts alone shall be good and sufficient discharges for such annual sum, from time to time, as and when the same shall become due and payable, the first quarterly payment of such annual sum to become due at the expiration of three months next after my decease; and I direct that the residue of the said *rents*, dividends, and annual proceeds during the lifetime of my said wife, and, after her decease, that the whole of such *rents*, dividends, and annual proceeds shall be divided into two equal parts or shares, and that each of my two daughters, *Mary Ann* and *Hannah*, shall be paid one of such parts or shares, for her sole and separate use during her life, free from the control, debts or engagements of any husband; and, to that end, I direct that the receipts alone of my said daughters shall, from time to time, be an effectual discharge for such *rents*, dividends and proceeds when and as the same become payable; and that they shall not have power to charge, incumber or in any manner dispose of their respective life interests or any part thereof respectively, by way of anticipation: and I do hereby further declare and direct, but without prejudice to the payment of the said annuity to my said wife, that, after the decease of each of my said daughters, one moiety of my said *trust estate and effects* shall be held and remain in trust for her respective child or children who shall live to attain the age of twenty-one years, in equal shares, if more than one, and their respective executors, administrators and assigns; and, if there shall be but one such child, then in trust for that one or only child, and his or her executors, administrators and assigns; but if either of my two daughters shall have no child who shall live to attain the age

1849.

BOWDEN v. BOWDEN.

of twenty-one years, then the part or share in my said *estate and effects* given to her, shall be held and remain in trust for the other of my said two daughters, for her natural life, for her separate use as aforesaid; and, after the decease of such other of my said two daughters, upon similar trusts in favour of or for the benefit of her child and children as are hereinbefore declared with respect to her original part or share in the said *trust estate*, premises and effects: and I declare *that the legal estate and interest of and in all my leasehold estates* shall be vested in, and I do hereby give the same unto the said *J. Marston* and my said wife, their executors, administrators and assigns, upon the trusts and for the purposes of this my will; and I do hereby further declare and direct that my said trustees or trustee for the time being, do and shall, during the minority of either of my children, and also any of my grandchildren who may, for the time being, be presumptively entitled in possession under the trusts of this my will, pay and apply the *rents* and profits, interest and dividends and annual proceeds of the respective shares to which such children or grandchildren may, for the time being, be presumptively entitled in possession, of and in my said *estate and effects*, for or towards their respective support, maintenance, education and benefit: *Provided always and my will is and I hereby declare that it shall be lawful for the said* John Marston *and my said wife and the survivor of them and the trustees or trustee for the time being of this my will, to sell and dispose of all or any part of my leasehold or other estates*, by public sale or private contract, for the best price that can be reasonably obtained for the same, and receive the monies arising therefrom and convey, transfer, demise or assign such estates to the person or persons purchasing the same, who shall be discharged by the receipt or receipts of the said *John*

1849.

BOWDEN v. BOWDEN.

Marston and my said wife, or the survivor of them, or the trustees or trustee for the time being of this my will, for the payment of the money which shall be therein expressed to be received, and shall not be answerable or accountable for the application thereof, or for the misapplication or non-application of the same: and I hereby direct that the money to be produced or arise from such sale or sales as aforesaid, shall be laid out for the benefit of my said wife and daughters and their issue, in manner aforesaid, in such way and in the purchase of such stock in the public funds, or on real property, or on mortgage of freehold or *leasehold estates*, as my said trustees, or the survivor of them, or the trustees or trustee for the time being of this my will, shall see fit: and I do hereby also authorize and empower the trustees of this my will for the time being, *to grant any lease or leases of any part or parts of my said estates*, for any term or number of years, at such yearly rents, with or without taking any fines or premiums, as to them shall seem meet. Provided also and I do hereby declare and direct that, if the said *John Marston* and my said wife, or either of them, or any future trustee or trustees to be appointed as hereinafter mentioned, shall die or refuse or decline or become incapable to act in the trusts hereby in them reposed as aforesaid, then a new trustee or trustees may be appointed by my said wife during her life, and, after her decease, by the acting or continuing trustees or trustee for the time being, or the executors or administrators of the last acting or continuing trustee of this my will; and the said trust moneys and premises shall, in all such cases, be conveyed and assigned so as to be vested in such new trustee and such surviving or continuing trustee, or in such new trustees, wholly, as the case may happen, upon the trusts and with the same powers as are hereinbefore, in this my will, mentioned

1849.

BOWDEN v. BOWDEN.

and declared, and so, from time to time, as often as that case shall happen. Provided also and I do hereby likewise declare and direct that my said trustees and the trustees or trustee for the time being of this my will, shall not be answerable one for another, and, by no means, for involuntary losses, and that they shall be allowed and may retain to and reimburse themselves, out of the said trust premises, all their costs charges and expenses to be occasioned by the due execution of the trusts of this my will. And I appoint my said wife and the said *John Marston* executrix and executor of this my will."

The testator died in September 1841, leaving all the persons named in his will him surviving. One of his daughters married in March 1839, and had three children, the eldest of whom was born in 1842. The testator had no real estate; but he had leasehold property which consisted of houses held for different terms of years, the longest of which would expire in 1894.

The Cause now came on to be heard for further directions, as a short Cause. The question was whether the leaseholds were to be sold and the proceeds invested in permanent securities, or whether they were to be enjoyed, *in specie*, by the successive *cestuis que trust* under the will.

Mr. *Bethell* and Mr. *Lewin*, for the Plaintiff, the testator's widow, who was desirous that the leaseholds should be sold, said that the will clearly showed that the testator meant his leasehold estate, which was the principal part of the trust property, to be so dealt with as that the children of his children might have the benefit of it; and that the only mode of securing that object, was to sell the leaseholds and invest the proceeds in per-

1849.

BOWDEN v. BOWDEN.

manent securities: *Pickup* v. *Atkinson* (*a*). They contended, also, that the power of sale in the will, was a trust power, and was imperative upon the trustees.

Mr. *Stuart* and Mr. *Goodeve*, for the Defendants, relied on the frequent use of the word "rents," and on the power of sale in the will, as showing that the testator had not made it obligatory upon his trustees to convert his leaseholds into money.

The *Vice-Chancellor* held that the leaseholds were not to be sold.

(*a*) 4 Hare, 624.

MILLER *v.* HUDDLESTONE.

1849: 17th, 19th, and 24th July.

Legacy, Priority. Abatement. Will. Construction. Annuity.

Testator gave all his property to trustees, in trust to pay his debts and funeral and testamentary expenses, and to invest the residue in the funds and, *out of the interest and dividends*, to pay certain annuities to his daughter and other persons, and, *after payment of them*, to pay the remainder of the interest and dividends to his wife, for life; and he directed that, if his daughter should have a child living at the decease of his wife or born afterwards, her annuity should cease, and that his trustees should raise 20,000*l.* out of his trust estate and hold it in trust for his daughter for life and, after her death, for her children, and if the children should die under twenty-one, that it should sink into *his residuary estate thereinafter disposed of*: and he further directed that, after the decease of his wife, his trustees should pay the sum of 5000*l.*, *part of his residuary estate*, to such person, &c., as his wife should appoint by her will: and, subject to the trusts of his will, he gave the residue of his trust-estate to his trustees and certain other persons.

The testator's property was insufficient to pay the annuities and the 5000*l.* in full. Held, taking the whole of the will together, that the annuities were to be paid in priority to the 5000*l.*, and, if necessary, out of the *corpus* of the testator's property.

THOMAS CRESWICK made his will dated the 5th of December 1834 and, partly, in the following words:

"I give and bequeath, unto my wife, *Sarah Creswick*, all my household furniture, linen, plate, china, wearing apparel, pictures and other effects which shall be in my dwelling houses at the time of my decease, together with my carriage, carriage horses and harness, and the sum of 1000*l.* to be paid to her immediately after my decease, for her own immediate use: and I give devise and bequeath, unto the said *Sarah Creswick*, and to my nephews, *Thomas Creswick Huddlestone*, *William Jackson*, and *Paul Jackson*, all my freehold, copyhold, and leasehold messuages, lands, tenements and hereditaments whatsoever and wheresoever, and all the rest and residue of my goods, chattels, stock in trade, monies, securities for money, money in the public stocks or

1849.

MILLER v. HUDDLESTONE.

funds, debts, effects and personal estate whatsoever and wheresoever and of what nature or kind soever, to hold the same, unto the said *Sarah Creswick*, *Thomas Creswick Huddlestone*, *William Jackson* and *Paul Jackson*, their heirs, executors, administrators and assigns, upon trust that the said *Sarah Creswick*, *Thomas Creswick Huddlestone*, *William Jackson* and *Paul Jackson*, or the survivors or survivor of them, or the heirs, executors or administrators of such survivor, do and shall, with all convenient speed after my death, sell and dispose of my freehold, copyhold and leasehold messuages, lands, tenements and hereditaments, stock in trade and other parts of my said personal estate, and collect and get in all my outstanding debts, and convert the whole of my said trust estate, except money in the public or government stocks or funds, into ready money, and stand possessed of the money arising from such sale and collection as aforesaid, upon trust to pay off and discharge all my just debts, funeral and testamentary expenses; and, after such payment made as aforesaid, upon trust to lay out and invest the residue of the said money arising from such sale and collection, in their own names, or in the names or name of the survivors or survivor of them, on government stocks, funds or securities, and to stand possessed of the stocks, funds and securities whereon the same shall be invested, upon trust, *out of the interest or dividends arising therefrom and other income arising from my said trust estate*, to pay, unto my daughter, *Mary Ann Miller*, the wife of *George Miller*, one annuity or yearly sum of 500*l.*, during her natural life, without any deduction for legacy duty or other deductions whatsoever, by equal half-yearly payments, to and for her own proper use and benefit, and with which her said present or any future husband with whom she may hereafter intermarry, shall not intermeddle or have any-

1849.

MILLER v. HUDDLESTONE.

thing to do, nor shall the same be liable to the control, contracts, debts or engagements of her said present or any future husband, and her receipt, although *coverte*, shall be the only good and sufficient discharge, to my said trustees, from time to time, for such annuity: and upon further trust, *out of the said interest or dividends*, to pay, unto my brother, *William Creswick*, one annuity or yearly sum of 100*l.*, without any deduction for legacy duty or any other deduction whatsoever, during his natural life, by equal quarterly or half-yearly payments as may best suit my said trustees; and, from and after the decease of my said brother, *William Creswick*, upon trust to pay, to my nephew, *Thomas Creswick*, the blind son of my said brother, *William Creswick*, one annuity or yearly sum of 50*l.* during his natural life, without any deduction for legacy duty or any deduction whatsoever, by equal quarterly or half-yearly payments as may best suit my trustees to pay the same: and I will and direct that the respective receipts of my said brother, *William Creswick*, and of my said nephew, *Thomas Creswick*, for their said annuities, shall be the only good discharges, to my said trustees, for the same respectively; and that the said annuities shall not be alienable, assignable or transferable by my said brother, *William Creswick*, and my said nephew, *Thomas Creswick*, to any person or persons whatsoever: and, *after payment of the said several annuities*, upon trust to pay the remainder *of the interest or dividends* arising from such investment, *and the rents and profits* of any part of my said freehold, copyhold or leasehold hereditaments which shall be unsold and let on lease as hereinafter provided for, *and the interest* of any money which shall be lent upon security as hereinafter mentioned, unto my said wife, *Sarah Creswick*, or permit and suffer her to receive the same during her natural life, and also the

1849.

MILLER v. HUDDLESTONE.

said annuities in case any or either of them shall cease to be longer payable to the said annuitants, any or either of them, in her lifetime, to and for her own proper use and benefit; and, from and after the decease of my said wife and during the lifetime of my said daughter, *Mary Ann Miller*, and if she, the said *Mary Ann Miller*, shall have no child or children living at the time of the decease of my said wife, upon trust to pay, to the said *Mary Ann Miller*, a further annuity or yearly sum of 500*l.* during her natural life, to and for her own sole and separate use, in the same manner and with the same restriction on her present or any future husband, as is hereinbefore contained respecting the first-mentioned annuity of 500*l.* payable to her; but if my said daughter, *Mary Ann Miller*, shall have any child or children, living at the time of the decease of my said wife, by her said present or any future husband with whom she may hereafter intermarry, or if my said daughter shall have any child or children at any time after the decease of my said wife, then, from and after the birth of such child or children, the said two several annuities of 500*l.* each, shall cease and be no longer paid or payable to my said daughter, but I will and direct that the said *Thomas Creswick Huddlestone*, *William Jackson* and *Paul Jackson*, or such of them who shall then be living, and the trustees or trustee for the time being shall, by sale of so much of the stocks, funds or securities upon which my said trust estate shall then be invested as will be sufficient, raise the sum of 20,000*l.*, and, after the same shall be raised as aforesaid, upon trust forthwith to invest the same in some or one of the public or government stocks or funds, in their own names, or in the names or name of the survivors or survivor of them, or of the trustee or trustees for the time being, and, after such investment, shall stand possessed of the stocks,

1849.

MILLER v. HUDDLESTONE.

funds or securities upon which the same shall be invested, upon trust to pay the interest or dividends arising therefrom, unto my said daughter, *Mary Ann Miller*, during her natural life, to and for her own sole and separate use, and with the like restrictions respecting her said present or any future husband as are hereinbefore mentioned and expressed concerning the said annuities to be paid to her for life in case she, my said daughter, shall have no child or children; and, from and after the decease of my said daughter, upon trust for all and every the children of my said daughter, *Mary Ann Miller*, if more than one, to be divided between them, share and share alike, at their respective ages of twenty-one years; and in case there shall be but one child of my said daughter who shall live to attain the age of twenty-one years, then upon trust for such only child, and to be transferred to him or her on his or her attaining his or her age of twenty-one years; and in case all my said daughter's children shall happen to die before they shall attain the age of twenty-one years, I will and direct that the said 20,000*l.*, or the stocks, funds or securities upon which the same shall be invested, shall sink into and become part of *my residuary estate hereinafter disposed of*: and upon further trust that the said *Thomas Creswick Huddlestone*, *William Jackson* and *Paul Jackson*, or the surviving trustees or trustee, or the trustees or trustee for the time being, do and shall, after the decease of my said wife, pay the sum of 5000*l.*, *part of my residuary estate*, unto such person or persons, in such parts and proportions and at such time and times as my said wife, *Sarah Creswick*, shall, by her last will and testament in writing, give and bequeath or direct and appoint the same to be paid unto, except such gift, bequest or appointment shall be made to or for the benefit of her brother, *Charles Elsee*, or his wife or his

1849.

MILLER v. HUDDLESTONE.

children or child; and, in case such will of my said wife shall contain any gift or benefit to the said *Charles Elsee* or his wife or children or child, then the power intended to be given to my said wife to dispose of the said 5000*l.* by her will, shall cease and determine, and the said 5000*l.* shall remain part of my residuary estate hereinafter disposed of, and, except as to the sum of 1000*l.* hereinafter mentioned, upon or for no other trust, intent or purpose whatsoever: And, subject to the trusts of this my will, I give and bequeath *the residue of my said trust estate*, unto my said nephews, *Thomas Creswick Huddlestone*, *William Jackson* and *Paul Jackson*, and my nieces *Emma Huddlestone*, *Anne Garton Jackson* and *Sarah Maria Jackson*, equally to be divided between them, share and share alike, when and as the same or any part thereof shall become divisible by the deaths of the said annuitants or otherwise; it being my will and meaning that, after the payment of the said sum of 5000*l.* of which my said wife is to have the disposal by her will as aforesaid, the said 1000*l.* of which she is to have the disposal either by gift in her lifetime or by her will, to my said trustees, *Thomas Creswick Huddlestone*, *William Jackson* and *Paul Jackson*, or such part thereof as she shall so dispose of by her said will, and reserving sufficient of my said trust estate to raise and pay the said annuities given to my said daughter or the said 20,000*l.* directed to be held for her and her children or child in the event of her having any children or child at any time hereafter, and the said annuity of 100*l.* given to my said brother, *William Creswick*, for life, and, after his decease, of the annuity of 50*l.* given to his son, *Thomas Creswick*, during his life, my said residuary estate may be divided between my said residuary legatees, at any time after the decease of my said wife, as they, the said *Thomas Creswick Hud-*

1849.

MILLER v. HUDDLESTONE.

dlestone, *William Jackson* and *Paul Jackson*, or the survivors or survivor of them, and the trustees or trustee for the time being, shall think proper. And, as it is my wish to spare my said wife all the care and trouble possible in the management of my affairs, I have appointed my said three nephews to be executors and trustees with her, hoping and expecting they will be active and render every assistance in their power for the settling and arranging my affairs. And, to enable my said wife to make them some compensation out of my said trust estate for such care and trouble, I do hereby will and direct that my said wife shall have power to dispose of 1000*l.*, part of my said trust estate, or such part or parts thereof, either by gift in her lifetime or bequests by her will, to her said three co-trustees, *Thomas Creswick Huddlestone*, *William Jackson* and *Paul Jackson*, in such proportions as she, my said wife, shall think fit and proper; and my said trustees are, by this my will, directed and empowered to pay and dispose of the said 1000*l.* or such part or parts thereof as my said wife shall direct either in her lifetime or after her decease, to the said *Thomas Creswick Huddlestone*, *William Jackson* and *Paul Jackson* or any or either of them."

The testator died in September 1840. His widow retained her legacy of 1000*l.*, and made valid appointments of the 5000*l.* and of 800*l.* part of the 1000*l.*, which she had power to dispose of under the will. She died in February 1843. The testator's brother, *William Creswick*, also was dead; and had been fully paid his annuity of 100*l.* The testator's daughter, *Mary Ann Miller*, was the Plaintiff in the Cause. She had never had a child; and arrears to the amount of 4567*l.* were due to her in respect of her two annuities of 500*l.*; and

1849.

MILLER v. HUDDLESTONE.

the sums of 5000*l.* and 800*l.*, remained unpaid. There not being property sufficient to pay those sums and the annuities, the question, on the Cause coming on to be heard for further directions, was whether the annuities ought to abate proportionably with those sums, or whether the annuities ought to be paid in priority to them, and, if necessary, out of the *corpus* of the testator's property.

Mr. *Rolt* and Mr. *Stinton*, for the Plaintiff, contended that the annuities given by the will were charged, not upon the income only, but upon the *corpus* of the testator's property, and that they ought to be paid in priority to the 5000*l.* and 800*l.*: *Foster* v. *Smith* (*a*), *Wroughton* v. *Colquhoun* (*b*), *Arnold* v. *Arnold* (*c*), and *Boyd* v. *Buckle* (*d*).

Mr. *Bethell* and Mr. *Lloyd*, for the executors and the other residuary legatees, and Mr. *Koe* and Mr. *Shadwell*, for the persons entitled to the 5000*l.* under the appointment made by the testator's widow, said that the will contained no simple gift of the annuities, but only a direction to pay them out of the income of the trust-property; and that there was a great difference between an indefinite gift of the income of property, and a direction to pay annuities out of it. They cited *Heneage* v. *Lord Andover* (*e*).

Mr. *Walker* appeared for the Plaintiff's husband, and

(*a*) 2 Youn. & Coll. C. C. 193.

(*b*) 1 De Gex & Smale, 357.

(*c*) 2 Myl. & Cr. 256.

(*d*) *Ante*, Vol. X., page 595.

(*e*) 3 Youn. & Jerv. 360.

Mr. *Giffard* for *Thomas Creswick*, the testator's blind nephew, to whom an annuity of 50*l.* was given.*

Mr. *Rolt* replied.

The VICE-CHANCELLOR:

I have perused this will several times, and I will first state the conclusion I have come to upon it, and then give my reasons for it. With respect to the annuity of 50*l.* to the blind person, that is matter of concession. Then it appears to me that the first annuity of 500*l.* to the daughter, must be provided for: and it seems to me, upon the language of the will to which I shall advert, that, in the next place, the 100*l.* annuity must be provided for; and then that the second annuity of 500*l.* to the daughter, which is payable in the event, which has happened, of her having no child, is the next thing to be provided for: and the sum of 800*l.* is the fourth thing: and the sum of 5000*l.*, which the wife had power to appoint, is the fifth and last.

The language is very peculiar. After the preliminary part of the will, and after having directed that the trustees are to pay all his just debts and funeral expenses, the testator says: "Upon trust to lay out and invest the residue of the said money arising from such sale and collection, in their own names, in Government stocks, funds or securities, and stand possessed of the stocks, funds and securities wherein the same shall be invested, upon trust, out of the interest or dividends arising therefrom and other income arising from my said trust-estate, to pay unto my daughter, *Mary*, the yearly

* All parties consented that his annuity should be paid in full.

1849.

MILLER v. HUDDLESTONE.

sum of 500*l.*: and upon further trust, out of the said interest or dividends, to pay my brother, *William*, one annuity or yearly sum of 100*l.*" And then there follows that undisputed annuity of 50*l.* And then the testator says: "And, after the payment of the said several annuities, upon trust to pay the remainder of the interest or dividends arising from such investment and the rents and profits of any part of my freehold, copyhold or leasehold estates which shall be unsold, unto my wife, *Sarah*, or to permit her to receive the same during her natural life and also"—now here is a sort of repetition —"the said annuities in case any or either of them shall cease to be longer payable"—but it most distinctly points out that they are, of course, to have a precedence to anything that the wife should take—"to and for her own proper use and benefit, and, from and after the decease of my wife in the lifetime of my daughter, *Mary*, and if *Mary* shall have no child or children living at the decease of my said wife, upon trust to pay to her, the said *Mary*, a further annuity or yearly sum of 500*l.* during her natural life, to and for her own sole and separate use, in the same manner and with the same restriction &c. as is hereinbefore contained respecting the first-mentioned annuity of 500*l.*" Therefore she is to have that annuity after the death of the widow, in the same manner as she would have the first. And I am the more confirmed in that opinion, namely, that the two annuities are to be taken together in the same beneficial manner, by what follows, although the following gift did not take effect by reason of *Mary* not having a child: because it is perfectly manifest that the 20,000*l.*, the benefit of which is given to *Mary* for life, was meant to be a substitute, not only for the second annuity of 500*l.*, but for the first: and it is plain therefore to me that, upon the death of his wife, the testator meant that

1849.

MILLER v. HUDDLESTONE.

the payment that should have priority, should be the second annuity of 500*l.* Then there follows the clause as to the 20,000*l.*, which it is not necessary to consider; for *Mary* has not had a child. Then the will goes on in this manner: "And in case all my said daughter's children shall happen to die before they shall attain the age of twenty-one years, I will and direct that the said 20,000*l.* or the stocks or funds in which the same shall be invested, shall sink into and become part of my residuary estate hereinafter disposed of: and upon further trust that the trustees for the time being, do and shall, after the decease of my wife, pay the sum of 5000*l.*, part of my residuary estate, unto such person or persons &c. as my said wife shall, by her will, appoint the same to be paid unto." Then come these words: "And, subject to the trusts of this my will, I give and bequeath the residue of my said trust estate unto my said nephews &c., &c., equally to be divided between them, share and share alike, when and as the same or any part thereof shall become divisible by the deaths of the said annuitants or otherwise; it being my will and meaning that, after payment of the said sum of 5000*l.*," and then he recapitulates all the different dispositions that he had made—"my said residuary estate may be divided, between my said residuary legatees, at any time after the decease of my said wife." Then comes this clause: "I do hereby will and direct that my said wife shall have power to dispose of 1000*l.* part of my said trust estate, or such part or parts thereof, either by gift in her lifetime or bequests by her will, to her said three co-trustees, in such proportions as she, my said wife, shall think fit and proper."

It seems to me plain therefore that the 1000*l.*, or so much of it as was intended to be given, is put upon a

1849.

MILLER v. HUDDLESTONE.

different footing from the 5000*l.*; because it was meant as a payment to take effect in the wife's lifetime; and I cannot but think, therefore, that there is quite sufficient, upon the face of the will, to show the order in which the testator meant that those different bequests should take effect.—I have read the will three or four times over, with a view to be quite sure that, according to my mode of interpretation, it was consistent throughout.

This Court doth, by consent of all parties by their Counsel at the bar, declare that the Defendant, *Thomas Creswick*, is entitled to be paid his annuity of 50*l.* given to him by the will of the testator, in priority to all the annuities and payments hereinafter mentioned. And this Court doth declare that the Plaintiff, *Mary Ann Miller*, is, in the next place, entitled to the annuity of 500*l.* first mentioned in the will of the testator; such annuity to be next provided for, out of the estate of the said testator; and it appearing, by the *Master's* report, that the annuity of the 100*l.* given by the said will to *William Creswick* for his life, was duly paid to him up to the time of his death, this Court doth declare that the same was well paid: And this Court doth declare that, in the next place, the Plaintiff, *Mary Ann Miller*, is also entitled to the further annuity of 500*l.* secondly mentioned in the said will, as far as the estate of the said testator will extend, and, if necessary, to be paid out of the *corpus* of the said testator's estate, in priority to the other bequests in the will of the said testator remaining unsatisfied: And this Court doth declare that, after payment and satisfaction of the said several annuities, the said Defendants *Thomas Creswick Huddlestone*, *William Jackson* and *Paul Jackson*, as appoin-

tees under the will of *Sarah Creswick* the widow of the said testator, are entitled to the legacy or sum of 800*l.* appointed by the said *Sarah Creswick* in respect of the 1000*l.* over which she had a power of appointment under the will of the said testator, with interest thereon at 4*l. per cent. per annum* from the 10th day of February 1843, the day of the decease of the said *Sarah Creswick*: And this Court doth declare that, after payment and satisfaction of such 800*l.* and interest, the said Defendants *Thomas Creswick Huddlestone* and *William Jackson*, as appointees in trust under the said will of the said *Sarah Creswick*, are entitled to the legacy or sum of 5000*l.* also appointed by the said *Sarah Creswick* in pursuance of the power contained in the said will, with interest thereon at 4*l. per cent.* from the said 10th day of February 1843; the day of the decease of the said *Sarah Creswick*: And this Court doth declare that, after payment of such several annuities and sums of money, the said Defendants *Thomas Creswick Huddlestone*, *William Jackson*, *Paul Jackson*, *Ann Garton Jackson* and *Sarah Maria Jackson* are entitled to the residue of the said testator's estate in equal proportions. And this Court doth order and decree the same accordingly.

1849:
21st July.

Mansion-house. Will. Construction.

Testator directed that a mansion-house, with suitable offices, fit for the residence of the owner of his estates (which were worth 15,000*l.* a year) should be erected by his trustees.

Held that the mansion-house ought to have a garden, and lawns and pleasure-grounds attached to it, and proper approaches made to it.

LOMBE *v.* STOUGHTON.

THE hearing of this Cause is reported, ante, Vol. XII. page 304.

The question which now came before the Court, on exceptions taken to a report in the Cause, was whether, under the direction, in the will, that a mansion-house *and suitable offices* fit for the residence of the owner of the testator's estate, should be erected, by the trustees of his will, on some convenient spot in the parish of *Bylaugh* in the county of *Norfolk*, according to such plan as the trustees, with the consent of the person for the time being beneficially entitled to the immediate freehold of the testator's manors &c. under his will, should think proper to adopt, adhering, as closely as possible (situation and other incidental circumstances being considered) to the plan of the house then the residence of *Robert Marsham*, Esq., at *Stratton Strawless* in the county of *Norfolk*, authorized, as the *Master* considered it did, merely the erection of a mansion-house and stables and other outbuildings, or whether it authorized, in addition thereto, the conversion of the ground near the mansion-house, into a garden, lawns and pleasure grounds.

It was said, in the course of the argument, that the house referred to in the will, had those accessories to it; but no plan of that house was produced. It was also said that the fund to be laid out, was, nearly, 7000*l.*; and that the testator's estates produced an income of 15,000*l.* a year.

The *Vice-Chancellor* said that it would be absurd to

1849.

LOMBE
v.
STOUGHTON.

hold that the testator intended merely a mansion-house and offices to be erected in a field; and that the reasonable construction of the direction in his will, was that he meant the mansion-house to be made suitable, in every respect, for the residence of the owner of an estate worth 15,000*l.* a year; which it would not be without the appendages of a garden, lawns and pleasure grounds, nor unless proper approaches were made to it: and, therefore, that the *Master* had erred in not including those ornamental matters in the plan of the mansion-house which he had approved of.

The *Solicitor-General*, Mr. *Bethell*, Mr. *James Parker*, Mr. *Rolt*, Mr. *Malins*, Mr. *Roundell Palmer*, Mr. *Elmsley*, Mr. *Toller*, Mr. *Follett*, Mr. *Messiter*, Mr. *Fleming* and Mr. *Bates*, were the Counsel in the case.

1849:
19th, 23rd,
24th, 25th
and 26th July.

Will.
Construction.

Testator devised certain tithes to his nephews *D.* and *W.* for their lives, successively; and, after the expiration thereof, to the several provisions and uses therein expressed and contained of and concerning *his real estates*: and he devised *all his real estates of what nature or kind soever, and wheresoever situate,* subject to the payment of his debts &c., in aid of his personal estate, to his niece, and her sons in strict settlement, with remainders to his nephew, *W.* and his sons, and to two other persons and their sons, in like manner, with remainder to another person in fee. The niece married and had a son after the date of the will; and the testator, by a codicil, devised *all his real estates of what nature or kind soever,* to that son, for life, with limitations, by way of remainder, to his first and other sons in tail male; and, on failure of such issue, he devised *all his said real* estates in the manner mentioned in his will, and declared that the devises thereinbefore made, should take effect in precedence to the devises *of his real estates contained in his will.* Held that the words "all my real estates," in the will, did not include the tithes; but that those words, in the codicil, did include them; and, consequently, that the estates for life in the tithes, limited to the testator's nephews *D.* and *W.* by the will, were postponed to the limitations, in the codicil, to the son of the testator's niece and his sons.

EVANS *v.* EVANS.

THE will of *Herbert Evans*, Esq. was dated the 11th of April 1835 and was, in part, as follows:

"I direct all my just debts, funeral and testamentary expenses to be fully paid and satisfied out of my personal estate not hereinafter specifically bequeathed; and I, hereby, charge and make chargeable all my real estate with the payment of such just debts and expenses, *in aid only* of such personal estate." The testator then gave directions as to his funeral, and gave *Evan Davies*, by whom it was to be conducted, five guineas, and one guinea to each of the workmen, mechanics, labourers and servants who should be in his employ and service at his death, to be paid *by his executrix.*

"I give and bequeath, to my illegitimate son, *William*

1849.

EVANS v. EVANS.

Jones Evans, 1500*l.*, to be paid him, together with the interest for the same after the rate of 5*l. per cent. per annum*, within the period of twelve months next after my decease, without any deduction thereout whatsoever, for his own, sole and separate use, benefit and disposal; *and this sum of* 1500*l. I hereby charge upon my freehold farm called Llechwedd-y-cwm*, situate in the parish of *Llanwenog* and county of *Cardigan*, now rented for 100*l. per annum*; which farm I purchased before marriage, and it is not in settlement or otherwise incumbered. I give and bequeath, unto my illegitimate son, *William Jones Evans* aforesaid, his executors, administrators and assigns, the sum of 1500*l.*, upon trust that he and they do and shall, within twelve months next after my decease, lay out the same, in sums of 300*l.* each, in purchasing annuities for the respective lives of the five daughters of my sister, *Anna Williams*, to be paid to them respectively, during their respective lives, to and for their sole use and benefit, separate and apart from their several and respective present and future husbands."

"I give and devise unto the Rev. *David Williams*, fifth son of my said sister, and his assigns, all *and every my shares, parts and proportions of and in the tithes yearly arising, growing and renewing within the said parish of Llanwenog and the titheable places thereof* (save and except the tithes yearly arising, renewing and increasing in, upon and from the demesne lands and hereditaments called *Highmead*) to hold the same, with the appurtenances, unto and to the use of the said *David Williams* and his assigns, *for and during his natural life*, but subject to the proviso next hereinafter contained: (that is to say) provided always and the last aforesaid

1849.

EVANS v. EVANS.

devise is upon this express condition, that if, at any time during his life, the said *David Williams* shall or may have or receive, from or by means of any ecclesiastical living or preferment, an annual income, sum or sums of money amounting, altogether and clear of all payments and deductions whatsoever, to the sum of 400*l.*, then and from thenceforth the said last-mentioned devise to him and his assigns, shall cease and determine, and my said shares, parts and proportions of and in the said tithes, shall go and be possessed, in like manner, by his brother, *Watkin Williams*, for the period of his life only; *then and after the expiration thereof*, to the several provisions and uses herein expressed and contained of and concerning *my real estate.*"

"I do hereby will and direct, and, for that purpose, bequeath that all and every the books, pictures, plate, furniture and effects of or usually in or about my mansion-house at *Highmead*, shall be considered as or in the nature of heir-looms, and pass, with my said house, in the same manner as if they were land or other real property appurtenant or appendant thereto, and shall, accordingly, continue annexed to my said mansion-house as long as the law will permit, and be inherited and enjoyed by the several persons who shall succeed *to my real estate* under or by virtue of *the limitations of this my will*; for so they passed to me. And I hereby devise and direct that proper inventories shall, immediately after my decease, be made and taken, by my executrix hereinafter named, of all the said pictures, books, plate, furniture and effects so bequeathed as heir looms as aforesaid, and signed by her, and a true and attested copy thereof be deposited with the title deeds and writings concerning *my real estates*, for the better

information of the person or persons who shall, from time to time, succeed thereto."

"I give and devise *all my real estates*, of what nature or kind soever and wheresoever situate, subject to the payment of my just debts, funeral and testamentary expenses *in aid of* my personal estate as aforesaid, unto and to the use of my niece, *Mary Anne Elizabeth Evans*, and her assigns, for and during *her life*, and, after the determination of that estate by any means in her lifetime, to the use of the said *William Jones Evans* and the Rev. *William Jones* and their heirs, during the life of the said *Mary Anne Elizabeth Evans*, in trust for her and her assigns, and to support the contingent uses and estates hereinafter limited; and, after the decease of the said *Mary Anne Elizabeth Evans*, to the use of her first and other sons and the heirs of his and their bodies, according to priority of birth, and, for default of such issue, to the use of my nephew, *Watkin Williams*, fourth son of my said late sister, *Anna Williams*, and his assigns for and during his life; and, after the determination of that estate by any means in his lifetime, to the use of the said *William Jones Evans* and the Rev. *William Jones*, &c.; and, after the decease of my said last-mentioned nephew, to the use of his first and other sons and the heirs of his and their bodies, according to the priority of birth:" with remainders to the use of *Henry Vaughan*, son of the testator's late nephew *Edward Vaughan*, for life and to his first and other sons in tail; with remainders to the use of *Herbert Rice*, for life, and to his first and other sons in tail; with remainder to the use of *William Jones Evans* in fee.

"I give and bequeath, unto my wife, *Elizabeth Evans*,

1849.

EVANS v. EVANS.

the sum of 500*l.*, to be paid to her, her executors, administrators or assigns, *by my executrix* hereinafter named, within twelve calendar months next after my decease, without interest, upon this express condition that she, the said *Elizabeth Evans*, do and shall, by some good and sufficient deed or deeds or instrument or instruments in writing, bind herself to receive, from the person who, for the time being, shall be in the possession of *my real estate* under the limitations aforesaid, an annual sum of 500*l.*, in lieu of herself taking possession of the hereditaments settled upon her, by way of jointure, by the settlement made upon our marriage or afterwards, for so long time as the said annuity of 500*l.* shall be regularly paid to her by half-yearly payments."

"All the rest and residue of my personal estate and effects of what nature or kind soever, I give and bequeath unto my said niece, *Mary Anne Elizabeth Evans*."

The testator then declared that, if any of the legatees or devisees under his will, should go into mourning on account of his death, they should forfeit their legacies in case they were legatees, and the estate and interest thereby devised to them, in case they were devisees; and he appointed his niece, *Mary Anne Elizabeth Evans*, executrix of his will.

First codicil.

The testator made a codicil of the same date as his will, and thereby gave, to his nephew, *Watkin Williams*, a legacy of 500*l.*, to be paid, *by his executrix*, at the end of twelve calendar months next after his decease.

Second codicil.

The testator made a second codicil, which was dated the 9th of October 1838, and thereby, after giving a

1849.

EVANS v. EVANS.

further legacy of 500*l.* to his wife, and all the houses, outhouses and appurtenances called *Highmead*, together with the gardens and orchards thereto pertaining, and certain fields and pieces of land near thereto, for her life, provided she should reside in the house six months in the year, he declared that, if she should not do so, the premises, together with the lands, appurtenances and furniture, should be dealt with *according to the provisions laid down in his will*: and, after revoking the legacies of 300*l.* each, given by his will, to the daughters of his sister *Anna Williams*, and the legacy of 500*l.* thereby given to his nephew, *Watkin*, and leaving all of them 100*l.* each in lieu thereof, and after giving legacies to certain other persons, he proceeded thus: "And whereas, in my last will, I have placed my nephew, *Watkin Williams*, in the entail in *my estates real and personal* after his cousin *Mary Anne Elizabeth Evans*, now *Mary Anne Elizabeth Davies*, and her heirs male; and after the name, in my will aforesaid, of *Watkin Williams* so in entail placed, I have named *Henry Vaughan*, and, after the said *Henry Vaughan* I have named, in the said entail, *Herbert Rice*, I hereby alter and change the disposition in my will, in so far as that the name of my nephew, *David Williams*, shall come in and be and be in force in my will next to the name of his brother, *Watkin Williams*, and this for all *estates real and personal* possessed by me in my own right; the estates settled upon his children by my father, not being introduced into the account."

Third codicil.

The testator made a third codicil, which was dated the 19th of November 1839, and thereby appointed his nephew, *David Williams* in conjunction with his illegitimate son, *William Jones Evans*, to be the trustees and executors of his will and codicils, and gave *William*

1849.

EVANS v. EVANS.

Jones Evans a legacy of 200*l.* in addition to the legacy left him by the will: and the testator declared that *all the estates* left and disposed of by his will, were so left *without impeachment of waste* against any one in possession of the same in due succession, each to be permitted *to cut and fell timber for repairs of all buildings on the estate* when necessary.

Fourth codicil.

The testator made a fourth codicil, which was dated the 2nd of May 1842, and thereby gave 1500*l.* to *David Williams* and *William Jones Evans* in trust to lay it out in the purchase of an annuity for each of the five daughters of his sister, *Anna Williams*, who should be living at his decease; and he directed that the legacy-duty upon that sum should be paid *out of his residuary personal estate*: and he gave his messuage and lands, called *Maes-y-gaer*, to the intent that *Anne Evans*, the mother of *Sarah Davies*, who was the wife of *John Davies* of *Maes-y-gaer*, might, during her life, receive, out of the rents and profits thereof, an annuity of 8*l.*, and to the intent that *Sarah Davies*, might, after her mother's death, receive, in like manner, an annuity of the same amount; and he directed that they should have the same or the like remedies, by distress, for the recovery of their respective annuities, as landlords had for the recovery of rent in arrear upon common leases. The codicil then continued as follows:

"And, subject to the said several annuities and to the remedies for the recovery thereof, I give and devise the said hereditaments to the uses hereinafter declared of and concerning *my real estate.* I give and devise all *my real estates of what nature or kind soever*, subject, as to my freehold farms called *Rhydybout* and *Capel Jago*, to the charge hereinafter contained, unto *Herbert*

1849.

EVANS v. EVANS.

Davies, son of my niece *Mary Anne Elizabeth Davies*, for his life, with remainder, on the determination of his estate in his life-time, to my executors and administrators for his life, upon trust to preserve the contingent remainders hereinafter limited, but to permit him to receive the rents and profits; with remainder to the first, second and every other subsequent son of the said *Herbert Davies*, successively, according to seniority, in fee simple; so that the estate of such first, second or subsequent son shall, in the event of his death under the age of twenty-one years without leaving male issue living at his death, be divested and go to his brother; but, if there shall be no son of the said *Herbert Davies*, or none who shall attain the age of twenty-one years or die under that age leaving issue male living at his death, then I give and devise *all my said real estates*, subject as aforesaid, to every son of my said niece, *Mary Anne Elizabeth Davies* and his issue male in succession; so that every eldest son and his issue male may be preferred to every younger son and his issue male; and so that every such son may take an estate for his life with remainder to his first and every subsequent son, successively, according to seniority, in tail male; and, on failure of such issue, then I give and devise *all my said real estates* in such manner as is, in that behalf, mentioned in my said will; hereby declaring it to be my will *that the devises hereinbefore made shall take effect in precedence to the devises of my real estates contained in my said will:* and I hereby direct that every person who shall become entitled in possession to *my said real estates* by virtue of the devises hereby made, shall, within eighteen calendar months after he have become so entitled, endeavour to obtain an Act of Parliament or license from the Crown, authorizing such person to assume and use the surname of *Evans*, and also the

1849.

EVANS v. EVANS.

arms of my late father *Herbert Evans*, Esq., of *Highmead* aforesaid, and, in case of neglect or refusal to comply with these requisitions, the estate hereby devised to the person so neglecting or refusing, shall cease and the subsequent devises be accelerated. I give and bequeath to *Evan Jones* one annuity or yearly sum of 6*l.* during his life, to be paid him, half-yearly, *by my executors*; the first payment thereof to be made at the end of six calendar months next after my decease. I hereby confirm, to the said *William Jones Evans*, his executors, administrators and assigns, all devises, gifts * by my said will and codicils to him made. I desire that all my debts, annuities and *legacies* (save and except the said annuities hereby given to the said *Anne Evans* and *Sarah Davies*) *shall be paid, in the first place, out of any monies I may die possessed of invested in* 3*l.* per centum per annum *Consolidated Annuities as far as they will extend; and I charge all my said freehold farms, called* Rhydybout *and* Capel Jago, *with the payment of all such debts, annuities and legacies except as aforesaid, in aid of the monies I may die possessed of and invested as aforesaid:* And, lastly, I appoint the said *David Williams* and *William Jones Evans residuary legatees and executors of my will and the codicils thereto.*

The testator died on the 7th of March 1843. After his decease, the licence of the Crown was obtained, on behalf of *Herbert Davies*, the son of the testator's niece *Mary Ann Elizabeth Davies*, who was an infant, to take the name and arms of *Evans*, in pursuance of the direction for that purpose contained in the fourth codicil: and he instituted this suit, by his next friend, to have

* In the copy of the will and codicils which was produced in Court, and with which the reporter was furnished, the word "and" was not inserted between the words, "devises, gifts."

1849.

EVANS v. EVANS.

the will and codicils established and the trusts of them carried into execution.

The Cause was heard in July 1844, and the *Master* having made a separate as well as his general report in pursuance of the decree, and having found, by the former, that the legacy of 1500*l.* given, by the will, to the Defendant *William Jones Evans*, was charged, *exclusively, upon the testator's farm called* Llechwedd-y-cwm, *not in aid but in exoneration of the testator's personal estate*, a petition was presented, by *William Jones Evans* and *David Williams*, the testator's executors and residuary legatees, praying, amongst other things, that the separate report might be confirmed: and another petition was presented, by the Plaintiff, praying that it might be referred back, to the *Master*, to review his decision so far as it regarded the legacy; and that it might be declared that the legacy was charged upon the farm called *Llechwedd-y-cwm, in aid only, and not in exoneration* of the testator's personal estate. Those petitions now came on to be heard; and, the Cause came on to be heard for further directions at the same time.

It was arranged, amongst the Counsel, that, before the question raised by the petitions was argued, a question which arose upon the fourth codicil taken in connection with the will, should be discussed; and that, though it was a legal question, it should be decided by the *Vice-Chancellor*. That question was, whether the Plaintiff did not take, under the fourth codicil, a life estate, *in possession*, in the tithes devised, by the will, to *David* and *Watkin Williams* for their lives successively, as well as in the other real estates of the testator.

1849.

EVANS v. EVANS.

Argument.

Mr. *Bethell* and Mr. *Willcock*, for the Plaintiff, said that it would be contended that the words: "all my real estates," as used in the will, did not include the tithes; and that those words, as used in the fourth codicil, were to receive the same limited construction. There could, however, be no doubt that the language of the will was sufficiently comprehensive to include the tithes: but, however that might be, the language of the codicil was free from all doubt: for the testator had thereby devised all his real estates of *what nature or kind soever*; and had not, as he had in his will, added the words: "wheresoever situate," which might afford some ground for contending that he meant to devise only estates that admitted of locality, which tithes did not: that the case of *Hearle* v. *Hicks* (*a*) which, probably, would be cited on the other side, did not apply; for the fourth codicil did not revoke the limitations in the will, but only postponed them; and so made the devise of the tithes a devise in remainder, instead of a devise *in præsenti* as it was by the will: that, if the words, real estates did not include tithes, there was an intestacy as to the tithes of *Highmead*; for they were expressly excepted out of the devise to *David* and *Watkin Williams*.

Mr. *Money* appeared for a Defendant who was not interested in the question in discussion.

Mr. *Rolt* and Mr. *Greene*, for *William Jones Evans* and *David Williams*, and Mr. *James Parker* and *Mr. Lewin* for *Watkin Williams*, said that the whole scope of the will, showed that the testator called tithes, 'tithes,' and every kind of real property, except tithes, 'real estate;' and they referred, amongst other passages

(*a*) 1 Clark & Finn. 20, and see *errata* at the end of the Vol.

1849.

EVANS v. EVANS.

in the will, in which the words: 'my real estates,' were used, to the direction that, on the expiration of *Watkin Williams's* life-interest in the tithes, they should go to the several provisions and uses therein expressed and contained concerning the testator's real estates; and to the condition upon which the testator had given the legacy of 500*l.* to his wife; and also to the direction that a copy of the inventory to be taken of his books, pictures, plate and furniture, should be deposited with the title deeds concerning his real estates, for the better information of the person or persons, who should, from time to time, succeed thereto: by which, they said, the testator could not mean the persons who should take the tithes: *Doe* v. *Nevill* (*b*). They then said that the words 'real estates,' as used in the codicils, also meant real estates exclusive of tithes: and, in support of that proposition, they referred to the passages in the second codicil which are printed in italics, and to the declaration in the third, that all the estates left and disposed of by the will, were so left without impeachment of waste against every one in possession of the same in due succession, each to be permitted to cut and fell timber for repairs of all buildings on the estate when necessary. They concluded by observing that the devise in the fourth codicil, did not include any property except what was comprised in the residuary devise in the will, and that the only effect of it was to make the Plaintiff and the other issue male of the testator's niece, *Mary Anne Elizabeth Davies*, take that property in priority to the residuary devisees under the will: *Hearle* v. *Hicks*, *Hancox* v. *Abbey* (*c*), *Bateman* v. *Lord Rowden* (*d*).

(*b*) 12 Jurist, 181. (*c*) 11 Ves. 179.
(*d*) 1 Jones & Lat. 356.

1849.

EVANS v. EVANS.

Mr. *Stuart*, Mr. *Heberden*, Mr. *Bates*, and Mr. *Wickens* appeared for other parties.

Mr. *Bethell* replied.

The *Vice-Chancellor*.—It seems to me to be plain that the words 'real estates' in the will, do not include the fee of the tithes: the only question is whether those words in the fourth codicil, do or do not include it.—That question depends so much upon minute expressions in the instruments, that I shall read them all over, carefully, before I decide it.

25th July. Judgment.

The VICE-CHANCELLOR:

In this case, I am going to express an opinion which I have entertained ever since I read over the will and codicils for the first time.

I think that it is perfectly plain, upon the language of the will, that the gift of the tithes, made by the will, to *David and Watkin Williams*, in succession, is revoked by the devise in the last codicil.

The case in the House of Lords to which I was referred, bears, upon the face of it, essential marks of difference from the present case. What my *Lord Chief Justice Tindal* said in delivering the judgment, I perfectly accede to. He first makes a general representation of what the case was; and then he says: "Whether, therefore, this devise was revoked, must be determined, not by any express words to that effect, but by the consideration whether, upon the construction of the codicil, the devise and disposition therein contained, must, of necessity, be held inconsistent with the devise

1849.

EVANS v. EVANS.

to the wife." That has reference to the particular expression in the codicil to which his Lordship refers as showing that the testator, there, expresses an intention to revoke some only of the dispositions in his will. Now, in this case, the testator having made that particular provision in favour of his nephew, *David*, with a contingent remainder to his other nephew, *Watkin*, directs that the tithes, which were the subject of the provision, shall, after the expiration of the interests limited to them, go to the several provisions and uses therein expressed and contained of and concerning his real estate. So that it is plain, on the face of the will, that there is, first of all, a devise of the tithes in question, of that limited nature, with an express declaration that the reversion of the tithes shall go according to the devises that follow respecting the bulk of his real estate. It does not appear to me that there is anything, in the further part of the will or the first or second codicil, that relates to the matter; but, in the third codicil, there is this passage: "All the estates left and disposed of by my will, are hereby declared to be so left without impeachment for waste against every one in possession of the same in due succession, each to be permitted to cut and fell timber for repairs of all buildings on the estate, when necessary." Then I should observe that, by this third codicil, he appoints his nephew, *David*, and his illegitimate son, *William Jones Evans*, to be his executors. And, by the fourth codicil, which is the codicil in question, he subjects a certain tenement, called *Maes y gaer*, to the payment of certain annuities: and then he says: "And, subject to the said several annuities and to the remedies for the recovery thereof, I give and devise the said hereditaments to the uses hereinafter declared of and concerning my real estate," which is very much following the train of thought and the expression of ideas which are found in

1849.

EVANS v. EVANS.

the will; because, there, the reversion of the tithes is given in language of much the same nature, by way of reference. Then he gives and devises all his real estates of what nature or kind soever, subject, as to his freehold farms called *Rhydybout* and *Capel Jago*, to the charge thereinafter contained, (which charge he does not make until he comes to the last sentence but one in the codicil) in such a manner as to make the Plaintiff, his great nephew, who had then lately come into *esse*, take for life, with remainder to his issue. The testator then, after limiting the estates which were to be taken by that favoured individual and his issue, says: "And on failure of such issue, then I give and devise all my said real estates in such manner as in that behalf mentioned in my said will, hereby declaring it to be my will that the devises hereinbefore made, shall take effect in precedence to the devises of my real estates contained in my said will." Now, that is all perfectly plain. The general effect of the will is to make a devise, in the first instance, of the real estates: then this last codicil, unquestionably, comprehends all the real estates; and the only question is, whether these last words of reference can be considered as cutting down the large and general meaning of the words used in the first part, so as to adapt them only to the real estate which, in effect, was devised by the will: when I say devised by the will, I mean, devised by the will after the limitation of the tithes to the two tenants for life in succession. Now it should be observed that there is nothing whatever, on the face of the will or codicils, to show that there was any alteration whatever in the testator's real estates; so that the words, of themselves, do comprehend all the real estates such as they were at the time of the will. But, when I find that he goes on to say: "Declaring it to be my will that the devises hereinbefore

1849.

EVANS v. EVANS.

made shall take effect in precedence to the devises of my real estates contained in my said will," it appears to me that all doubt upon that question is taken, positively, away; because those words show that, though he might have had some sort of favour for *David*, first, and, afterwards, for *Watkin*, yet the engrossing and primary object of his affection, was the newly born son of his niece. And I am the more inclined to that opinion, when I find that, by this very instrument, *David*, who is deprived, as I think, of the benefit which he would have taken under the will, is made one of the residuary legatees. My opinion, therefore, is that this case is essentially distinguished from the case in the House of Lords; because, there the testator declared an intention to alter some only of the dispositions in his will; and, here, the testator declares that the overwhelming desire of his mind, as expressed in the fourth codicil, was that his great-nephew, the newly born son of his niece, should take precedence; and, therefore, he must have it.

Declare that, according to the true construction of the will and fourth codicil of *Herbert Evans*, the testator in the pleadings named, the estate for life given, by his will, to the Defendant, *David Williams*, and the conditional limitation over for the life of the Defendant, *Watkin Williams*, in the tithes, parts, shares and proportions of tithes, by the said will devised to them, are postponed until after the termination of the estates, by the fourth codicil to the said testator's will, limited to the Plaintiff, *Herbert Davies Evans*, for life, and in remainder to his sons.

1849.

EVANS
v.
EVANS.

Legacy.
Exoneration.
Will.
Construction.

Testator gave 1500*l.* to his illegitimate son, to be paid, with interest, within twelve months next after his decease, and he charged that sum upon his farm called *L.* which, he added, was then rented for 100*l.* a year, and which he purchased before his marriage and was not in settlement or otherwise encumbered. And he gave other legacies, and directed, as to some of them, that they should be paid *by his executors*: and he charged his real estates with the payment of his funeral and testamentary expenses and debts, *in aid* of his personal estate. By a codicil he confirmed, to his illegitimate son, all devises, gifts, by his will, made to him; and desired that all his (the testator's) debts, annuities and legacies (except two annuities thereby given to *A. E.* and *S. D.*) should be paid, in the first place, out of any monies he might die possessed of in the £3 per Cent. Consols, as far as they would extend; and he charged his farm called *R.*, with the payment of all such debts, annuities and legacies (except as aforesaid) *in aid* of his monies in the £3 per Cents. Held that the 1500*l.* was not charged on the farm called *L.*, exclusively and in exoneration of the testator's personal estate; but that, the Consols were to be applied first, the farm called *R.*, next, the testator's general personal estate, next, and the farm called *L.* last, in payment of it.

The question next discussed was that raised by the petitions: namely, whether the *Master* was right in finding that the legacy of 1500*l.* given to *William Jones Evans* by the will, was charged, exclusively, upon the testator's farm called *Llechwedd y Cwm*, not in aid but in exoneration of the testator's personal estate.

It appeared, from the *Master's* general report, that the Consols which the testator died possessed of, were not sufficient to pay his debts and legacies exclusive of the legacy of 1500*l.*; and that he was only tenant for life of the farm called *Capel Jago*.

Mr. *Bethell* and Mr. *Willcock*, in support of the Plaintiff's petition, contended that the testator's general, personal estate was first applicable, and that the farm, called *Llechwedd y Cwm*, was secondly applicable to the payment of the legacy of 1500*l.*: and they cited *Bootle* v. *Blundell* (*a*), and *Boughton* v. *James* (*b*).

Mr. *Stuart*, Mr. *James Parker*, Mr. *Lewin*, and Mr.

(*a*) 1 Meriv. 193; see pages 220 and 230.
(*b*) 1 Ho. of Lords Cases, 406.

1849.

EVANS
v.
EVANS.

Bates appeared for parties in the same interest as the Plaintiff.

Mr. *Rolt* and Mr. *Greene*, in support of the petition presented by *William Jones Evans* and *David Williams*, said that this was not a case where there was a general charge of legacies, but that there was a gift of a particular sum charged upon real estate, and that it was, in effect, a gift out of real estate: that it was not necessary for a testator to exonerate his personal estate from payment of a legacy, by express words; but if he gave a sum out of his real estate or charged upon his real estate, the sum was charged on his real estate in exoneration of his personal estate: that, in this case, the testator mentioned what was the rental of the farm on which the 1500*l.* was charged, and that it was not incumbered nor in settlement, in order to show that it was adequate to the payment of the 1500*l.*, and was available for that purpose: that he added that he had purchased it, in order to show that it was not a family estate, but one which he was quite justified in charging in favour of an illegitimate child: that there were several instances, in the will and codicils, in which the testator had charged, in express terms, his real estates *in aid* of his personal estate, and one fund in aid of another; but, in charging the 1500*l.* he had omitted the words "in aid," and, therefore, the Court must hold that he did not intend to charge the 1500*l.* in aid of his personal estate or of any other fund: that there was another distinction between the 1500*l.* and the other sums given by the will and codicils; namely, that the testator directed those sums to be paid by *his executrix or executors*, but did not give any such direction as to the 1500*l.*: that, as that sum was directed to be paid out of a particular estate, it was not a legacy in the proper sense of the

1849.

EVANS v. EVANS.

word; but was a 'devise' or 'gift' and was alluded to, as such, in that part of the fourth codicil in which the testator confirmed all devises, gifts made, to *William Jones Evans*, by his will and codicils: that the testator's personal estate was not applicable to the payment of that sum, nor, indeed, was it applicable to the payment of any of the legacies given by the will and codicils; inasmuch as, the testator had made, by his fourth codicil, a particular provision for the payment of them: that, at all events, the personal estate was not to be resorted to until the Consols and the farm called *Capel Jago* had been exhausted: *Jones* v. *Bruce* (*c*), *Amesbury* v. *Brown* (*d*), *Welby* v. *Rockliffe* (*e*), *Lamphier* v. *Despard* (*f*), *Dawes* v. *Scott* (*g*), *Browne* v. *Groombridge* (*h*), *Choat* v. *Yeats* (*i*), *Gittins* v. *Steele* (*k*), *Burrell* v. *The Earl of Egremont* (*l*), *Bateman* v. *Lord Rowden* (*m*), *Roberts* v. *Roberts* (*n*).

The VICE-CHANCELLOR:

I cannot accede to the *Master's* finding.

It is not necessary to go over the particular words in the will and codicils; but the substance of them is this: that the testator, by his will, gave, to his illegitimate son, a legacy of 1500*l.* and charged it upon one of his farms; and also devised to him the ultimate remainder in fee of all his real estates: and, the testator, by his third codicil, gave, to the same individual, a legacy of

(*c*) *Ante*, Vol. XI., page 221.
(*d*) 1 Ves. sen. 477, see 482.
(*e*) 1 Russ. & Myl. 571.
(*f*) 2 Dru. & Warr. 59.
(*g*) 5 Russ. 32.
(*h*) 4 Madd. 495.
(*i*) 1 Jac. & Walk. 102.
(*k*) 1 Swans. 24.
(*l*) 7 Beav. 205.
(*m*) 1 Jones & Lat. 356.
(*n*) *Ante*, Vol. XIII., page 336.

200*l.*; and, with the exception of the residuary bequest, which is the last thing in the fourth codicil, those things which I have stated, comprehend all the benefits which the son was to take.

Now observe what the testator does. By the fourth codicil he gives, first of all, certain annuities in a particular manner, which are charged in a particular way. Then, after having introduced what relates to the general devise, he says: "I hereby confirm, to the said *William Jones Evans*, his executors, administrators and assigns, all devises, gifts by my said will and codicils to him made." Therefore the testator calls to his recollection, by those words, everything which was previously given to the son; and I do not see that there is anything which will satisfy the words 'devises,' 'gifts,' except the things that I have already enumerated: and, if there is to be a very minute criticism upon the words, there would be no gifts in addition to the devise, except the legacies of 1500*l.* and 200*l.* Then, all those things being fresh in the testator's recollection, he writes the next sentence and says: "I desire that all my debts, annuities and legacies (save and except the said annuities hereby given to the said *Anne Evans* and *Sarah Davies*) shall be paid, in the first place, out of any monies I may die possessed of invested in the £3 per Cent. per Annum Consols, as far as they will extend: and I charge all my said freehold farms, called *Rhydybout* and *Capel Jago*, with the payment of all such debts, annuities and legacies, except as aforesaid." So that there is that general charge of all debts, annuities and legacies, with a marked exception, about the extent of which there can be no doubt. Therefore I think that I must of necessity hold that the legacy of 1500*l.*, which is given in the first part of the will, is one of the legacies comprehended

1849.

EVANS v. EVANS.

under that general charge; and consequently I must overrule the *Master's* report.

After the judgment had been pronounced, a discussion took place as to the order in which the different funds which were applicable to the payment of the testator's debts, annuities, and legacies were to be applied.

Mr. *Rolt* contended that the Consols were to be applied first, the *Rhydybout* farm, second, and the general personal estate, third.

Mr. *Money* contended that the general personal estate was to be applied next to the Consols.

The VICE-CHANCELLOR:

The testator has placed all his legacies on the same footing as to payment: and, as he has used the expression: "In the first place," the necessary consequence is that the Consols are to be applied first; the *Rhydybout* farm, next; and the general personal estate after it.

Declare that the legacy of 1500*l.* given, by the testator's will, to the Defendant *William Jones Evans*, is charged on the testator's farm called *Llechwedd y Cwm*, in aid only and not in exoneration of the testator's personal estate as after mentioned; and that the Bank £3 *per Cent. per Annum* Consolidated Annuities to which the testator was entitled at the time of his death, constituted the first fund or source for payment; and that, according to the true construction of his will and codicils,

1849.

EVANS v. EVANS.

his freehold farms called *Rhydybout* and *Capel Jago* were intended to constitute, and, his interest in the farm called *Capel Jago* having determined on his death, his estate called *Rhydybout* constituted the second fund or source for payment, and that his general residuary personal estate constituted the third fund or source for payment of all the testator's debts, annuities and legacies, except the annuities given, by the fourth codicil, to *Ann Evans* and *Sarah Davies*; and that the deficiency (if any) of such funds to answer the last-mentioned legacy of 1500*l.*, ought to be raised and paid out of the farm called *Llechwedd y Cwm*.

Revocation. Will. Construction.

Testator gave the residue of his personal estate to his niece and appointed her executrix. By a codicil, he appointed *A.* and *B.* his residuary legatees and executors.

Held that, though power to prove the will and codicil was reserved to the niece, the gift of the residue to her, was wholly revoked.

Another question was whether the gift of the residue to the testator's niece, Mrs. *Davies*, in the will, was wholly revoked by the appointment of *William Jones Evans* and *David Williams* to be residuary legatees, in the fourth codicil; or whether Mrs. *Davies* was entitled to share, in the residue, equally with those gentlemen.

It appeared, from the probate copy, that power was reserved, to Mrs. *Davies*, to come in and prove the will and codicils.

Mr. *Stuart* and Mr. *Bates*, for Mrs. *Davies*, said that *William Jones Evans* and *David Williams* were appointed executors and residuary legatees, in addition to and not in substitution for Mrs. *Davies*: that there was an express gift of the residue to Mrs. *Davies*, in the will, and no express revocation of that gift in the codicil; and, therefore, the Court could not hold that the gift in the will was revoked: that the appointment of one person for a particular purpose, was not revoked

1849.

EVANS v. EVANS.

by the appointment of two other persons for the same purpose: that the question had been decided, in effect, by the Ecclesiastical Court: and that if, as that Court had decided, the office of executor was to be held in thirds, the benefit attached to that office was to be held in like manner: *Hearle* v. *Hicks* (*a*), *Barber* v. *Barber* (*b*), *Frewen* v. *Relfe* (*c*).

The VICE-CHANCELLOR:

You must construe the gift of the residue as quite a separate thing from the appointment of executors.

Declare that the residuary personal estate of the testator, was bequeathed to the Defendants *William Jones Evans* and *David Williams* only, in equal moieties.

Heir-looms. Will. Construction.

Testator, by his will, directed that certain chattels in his mansion-house, should be annexed thereto and be inherited and enjoyed by the several persons who should succeed to his real estates *under the limitations of his will.* By a codicil, he limited his estates to certain other persons, and declared that those limitations should take effect in precedence to the limitations in his will. Held that the persons entitled under the limitations in the codicil, were entitled to the benefit of the direction, respecting the chattels, in the will.

The last question was whether the persons who were entitled to the testator's real estates under the limitations in the fourth codicil, were entitled to the benefit of the direction, in the will, that the pictures, books, &c. in the testator's mansion-house, should pass therewith and continue annexed thereto, and be inherited and enjoyed by the several persons who should succeed to his real estates *under or by virtue of the limitations of his will.*

(*a*) 1 Cl. & Finn. 20. (*b*) 3 Myl. & Cr. 688.
(*c*) 2 Bro. C. C. 219.

1849.

EVANS v. EVANS.

Mr. *Rolt* said that there was no gift, of the heir-looms, to the persons who took the real estates *under the limitations by the codicil*; and that, unless some person should come into possession of the estates, under the limitations in the will, within the time prescribed by law, the heir-looms would be undisposed of, and that, in the mean time, they would go to the residuary legatees.

The VICE-CHANCELLOR:

It is quite true that the testator has used the expression which you have pointed out: "under or by virtue of the limitations of this my will." His object was that the chattels should go as heir-looms, and my opinion is that I must take the codicil to be part of the will, to all intents and purposes.

Declare that the pictures, books, plate, furniture and effects, by the testator's will bequeathed as heir-looms, are to be enjoyed by the persons entitled to the testator's real estates under the devise thereof contained in the fourth codicil to his will.

1850:
1st March.

Petition. Costs. Impertinence.

The costs of a petition presented under an Act of Parliament, ordered to be paid by the Respondents, notwithstanding the Act was a public one, and several of the sections of it were set forth in the petition.

IN THE MATTER OF LILLEY'S TRUSTEES.*

MR. *MILLER* appeared in support of a petition for a reference, to the *Master*, to approve of a proper investment of money paid, into Court, by the South Western Railway Company, for land taken by them.

Mr. *C. Roupell*, for the Company, objected to the length of the petition, in which several clauses of the Lands Clauses Consolidation Act had been, as he contended, unnecessarily inserted, that Act being a public Act: the Company, therefore, ought not to pay the petitioner's costs.

The *Vice-Chancellor* said that the question had been often before him. In one case relating to the parish of *Woolwich*, facts relating to certain tenements were set forth, precisely in the same terms, seven or eight times over, when once would have been sufficient. In another case, the facts were stated both on the petition and the *Master's* report. In those cases he had considered the petitions unnecessarily long: but, in this case, there was, merely, a reference to an Act of Parliament under which the Court was asked to act. The Court could not carry about a library or remember all the Acts that had been passed. The sections, therefore, had been rightly set out in this case, and the petitioner must have his costs.

* *Ex relatione.*

TRENCH *v.* HARRISON.

1849: 6th November.

Purchase with trust-monies. Principal and agent.

THIS suit was instituted by a creditor, on behalf of himself and all the other creditors, of *John Wroughton Harrison*, deceased, against *Elizabeth Harrison*, the widow and personal representative, and *Grace Harrison*, the only child and heir of *John Wroughton Harrison*.

By an order in the Cause, made on the petition of *B. Wroughton* and *W. Shuttleworth**, who were the trustees of the settlement made on the marriage of *John Wroughton Harrison* with the Defendant *Elizabeth Harrison*, the *Master* to whom the Cause was referred, was directed to inquire and state how, and under what circumstances, and for whom, and on whose account, the copyhold premises purchased of *Thomas Edwards* as in the petition mentioned, were purchased, (and to which *John Wroughton Harrison* was admitted as tenant thereof according to the custom of the manor of which the same were holden) and by whom, and with whose money, and by what means, and how obtained the sum of 1587*l.* 10*s.*, the purchase-money for the same, was paid: and whether the same premises were vested in *John Wroughton Harrison* in his lifetime, and were vested in the Defendant *Grace Harrison*, as a trustee for the petitioners, who were the trustees of, or otherwise upon or subject to the trusts of the settlement; or, if not, whether any and what sum of money was due, from *John Wroughton Har-*

The trustees of a marriage settlement, being empowered by it to invest the trust funds in freeholds or copyholds of inheritance, with the consent of the husband and wife, authorized the husband to purchase a certain estate, as an investment of part of the trust-funds: and afterwards they sold out a sufficient part of those funds to pay for the estate, and the husband received the proceeds. The estate was copyhold for lives, and the purchase was made without the wife's consent. Held, nevertheless, that, *as between the husband and the trustees*, he must be considered to have purchased the estate for them.

* Neither of these gentlemen was a party to the suit.

1849.

TRENCH v. HARRISON.

rison in his lifetime, and was then due, from his estate, to the petitioners, for principal and interest in respect of monies advanced or paid to him, for the purpose of the said purchase or otherwise, out of the trust-funds vested in them under the settlement; and whether the petitioners were entitled to a lien upon the copyhold premises for securing payment of the same.—The following particulars appeared from the report made in obedience to that order.

By the settlement, *Elizabeth Harrison* assigned, to the petitioners, several sums of money amounting to 4000*l.*, to which she was entitled under her father's will, in trust to invest the same in the public stocks or funds, or in government securities, or on mortgage *of freehold or copyhold estates, or leasehold estates either for lives or years*, in their names, with power to alter and vary such stocks, funds and securities; and in trust to pay the interest, dividends and annual proceeds of the trust-monies, stocks, funds and securities, to *John Wroughton Harrison* and his wife, for their lives successively, and, after the decease of the survivor of them, upon certain trusts for the benefit of their child or children: and the settlement empowered the petitioners, at any time or times during the joint lives of Mr. and Mrs. *Harrison*, or during the life of the survivor of them, *with the consent of them*, or of the survivor of them, *to be signified by some writing under their hands* or under the hand of such survivor, to lay out and invest all or any part or parts of the trust-funds, in the purchase of any freehold, copyhold or leasehold messuages, lands, tenements or hereditaments, (of which no greater share or proportion than one fourth should be leasehold, nor should any such leaseholds be held for less than sixty years from the time when such purchase should be made) to be conveyed and assured unto and to

the use of, or otherwise vested in the petitioners and their heirs, executors, administrators and assigns, upon the trusts in the settlement declared, for enabling the petitioners to resell or reconvert the same premises as therein mentioned, and for the re-investment of the monies arising therefrom according to the trusts aforesaid; and upon trust, in the mean time, to apply the rents, issues and profits of the premises upon the same trusts and in the same manner as the interest, dividends and annual proceeds of the monies laid out in the purchase thereof, would have been applicable if the same had not been so laid out: the parties to the settlement thereby declaring that the messuages, &c. to be purchased with all or any part of the trust-monies, should, for the purposes of the settlement, be considered as money and should be subject to the same trusts, in all respects, as the money laid out therein would have been subject to, if the same had not been so laid out.

The sums assigned to the petitioners by *Elizabeth Harrison*, were invested, by the petitioners, in Consols, in their joint names. Afterwards *John Wroughton Harrison* applied to the petitioners, in pursuance of the power for that purpose contained in the settlement, to invest part of the monies subject to the trusts thereof, in the purchase of freehold or copyhold hereditaments; and, in 1841, he represented to the petitioners, that an opportunity offered for the investment of a part of the trust-monies in the purchase of the premises referred to in the order, and which were held of the manor of the sanctuary of *St. Stephen's* in *Cornwall*; and he requested the petitioners to sell out part of the Consols, and to invest the proceeds in the purchase of those premises, upon the trusts of the settlement. The petitioners, having been furnished with the valuation and particulars

1849.

TRENCH v. HARRISON.

of the premises and the terms of the proposed sale, *employed and authorized* John Wroughton Harrison (who was a practising solicitor and attorney) *to purchase the same for them, in order that they might hold the same, as an investment of part of the trust-funds, upon the trusts of the settlement.* Under these circumstances, *Harrison*, entered into a treaty, in his own name, and finally agreed with the lord of the manor to purchase the copyholds for 1587*l.* 10*s.* He then procured and sent, to the petitioners, for their execution, a power of attorney, authorizing him, as their attorney and on their behalf, to sell a sufficient part of the Consols to raise the 1587*l.* 10*s.*: and the petitioners executed the power of attorney on the faith and understanding that the 1587*l.* 10*s.* was to be invested in the purchase of the copyholds, and that the same would be conveyed and assured, to them, upon the trusts of the settlement. Under the power of attorney, *Harrison* sold a sufficient part of the Consols to produce 1587*l.* 10*s.*, and he received the proceeds and applied them in payment of the purchase-money for the copyholds. The petitioners alleged, in their state of facts, that, under the circumstances aforesaid, the copyhold premises ought to have been surrendered to them, and that they ought to have been admitted thereto upon the trusts of the settlement; and that they understood, from *Harrison*, and were led by him to believe, and they did believe that the copyholds would be and were so surrendered, and that they had been admitted tenants of the same; and that they instructed *Harrison*, as their solicitor and on their behalf, to provide for the same being so surrendered and for their being admitted thereto: but that, after *Harrison's* death, they discovered, for the first time, that *Harrison*, without their privity or consent, had procured himself alone to be admitted to the copyholds.

1849.

TRENCH v. HARRISON.

The admittance (which was set forth in the *Master's* report) was to the effect that *Harrison*, as sole purchaser, took of the lord of the manor, by delivery of the steward, for the lives of the Prince of *Wales*, Prince *George* of *Cambridge*, and *T. C. Powell*, all those pieces of land, &c., &c., to hold the same unto the Prince of *Wales*, Prince *George* of *Cambridge* and *T. C. Powell*, *for their lives and the life of the longest liver of them*, successively, according to the custom of the manor, yielding and paying therefor, yearly, to *T. Edwards* (the lord of the manor) his executors, administrators and assigns, lord or lords of the manor for the time being, during the lives of the Prince of *Wales*, Prince *George* of *Cambridge* and *T. C. Powell*, or the lifetime of the longest liver of them, the rent of 2*l.* 6*s.*, and also yielding, upon the several deaths of the Prince of *Wales*, Prince *George* of *Cambridge* and *T. C. Powell*, the sum of 10*l.* in lieu of a heriot, according to the custom of the manor, and serving the office of reeve when thereunto elected, and also repairing and sustaining, maintaining and keeping all and singular the said lands in all necessary reparations as often as need should require, and the same so repaired should leave and yield up; and doing and performing all burthens, offices, suits, customs and services, as other tenants of the manor had done and of right ought to do.

The *Master* found that the 1587*l.* 10*s.* was paid, by *Harrison*, *for the petitioners, out of the said trust funds, and on behalf of them the said trustees, as an investment on account of the said trust*: that the description of sole purchaser had, for a long time, according to the custom of the manor, been used in all admittances of any person or persons to premises for estates determinable on the lives of other persons;

1849.

TRENCH v. HARRISON.

and it was intended and supposed to preclude the *cestuis que vie* from making any claim to, or beneficial interest in the premises: that the 1587*l.* 10*s.* was paid into *Harrison's* account with his bankers, on the 28th July 1842; and that the sum of 1254*l.* 5*s.* 4*d.** was paid, to *Edwards*, by *Harrison*, by a draft on his bankers, which they cashed on the 24th of August 1842; and that, at the time when the 1587*l.* 10*s.* was paid into his banker's, *Harrison* had overdrawn his account with them, to the amount of 40*l.* 18*s.*; and that, between that time and the time when the 1254*l.* 5*s.* 4*d.* was drawn out, the sums paid into his account, amounted to 517*l.* 14*s.* 9*d.*; and the sums drawn out by him during the same period, amounted to 608*l.* 10*s.* 10*d.*; and that, without the 1587*l.* 10*s.*, he would have had no money standing to his credit, with his bankers, for payment of his draft for the completion of the purchase of the copyhold premises; and that the purchase was, in fact, completed *with and by means of the proceeds of the sale of the said Bank Annuities.* And the *Master* certified that he was of opinion that *Harrison*, in making the purchase from *Edwards*, *was to be deemed and considered as an agent acting for and on behalf of the petitioners in their character of trustees of the settlement; and that the copyholds were purchased, by him, for them and on their account, as such trustees as aforesaid, and with the money arising from the sale of* 1745*l.* 13*s.* 8*d.* *Consols sold under the power of attorney, being part of the trust funds, the subject of the settlement and standing in the names of them, the said trustees, and belonging to them as such trustees*, and that the 1587*l.* 10*s.*, the purchase-money for the copyholds,

* This sum appeared, from an account set forth in the *Master's* report, to be the balance due, from *Harrison* to *Edwards*, in respect of the purchase-money for the copyholds.

1834.

TRENCH v. HARRISON.

was obtained by means of the power of attorney. And the *Master* found that, according to the custom of the manor of the sanctuary of *St. Stephen's*, the legal estate in the copyholds was, by virtue of the grant and admittance made to *Harrison*, vested in the three persons named in the *habendum* of it; and that such persons, according to the custom of the manor, took in succession, for their lives, and were considered as holding as trustees for the purchaser and his representatives, who was or were, as between him or them and such three persons, the beneficial owner or owners of the lands and hereditaments. And he found that, according to the custom of the manor, the legal estate in the said copyhold premises, was, in *Harrison's* lifetime, under the circumstances aforesaid, and was, at the date of the report, vested in the Prince of *Wales*, Prince *George* of *Cambridge* and *T. C. Powell*, as trustees for the petitioners, the parties entitled to the beneficial interest in the same as trustees under the settlement. And he did not find that any estate or interest in the copyholds then was or ever had been vested in the infant Defendant *Grace Harrison*; but the equitable estate therein was vested in *Harrison* only, as a trustee for the petitioners, and, upon his death, became vested in his legal personal representative as a trustee for the petitioners.

Two petitions now came on to be heard: one of them was presented by *Wroughton* and *Shuttleworth*; and the other by the Plaintiff. The petition presented by *Wroughton* and *Shuttleworth* prayed that the *Master's* report might be confirmed; and that the petitioners might be declared to be, as trustees of the settlement, the beneficial owners of and the parties entitled to the whole equitable and beneficial interest in the copyholds; and that *Elizabeth Harrison* might be declared to be a

1849.

TRENCH v. HARRISON.

trustee, for them, of all such estate and interest in the copyholds as was vested in her late husband, and was then vested in his legal, personal representative; and that she might be ordered to execute all necessary conveyances and assurances for vesting such estate in the petitioners. The other petition, after stating that the Plaintiff was advised and insisted that the beneficial estate and interest in the copyholds, formed part of *Harrison's* estate, and that the same or the proceeds thereof, when sold, ought to be applied in payment of his debts, prayed that the report might not be confirmed; and that it might be declared that the equitable and beneficial interest in the copyholds, formed part of *Harrison's* estate; and that the same was applicable and ought to be applied in payment of his debts.

Mr. *Bethell* and Mr. *Bazalgette*, appeared for *Wroughton* and *Shuttleworth*.

Mr. *Stuart* and Mr. *Elmsley*, for the Plaintiff, said, first, that *Wroughton* and *Shuttleworth* were not parties to the suit, and, therefore, the Court had no jurisdiction to make the declaration and order prayed for by their petition: secondly, that the copyholds could not be held to have been purchased by them as trustees of the settlement, because the power which it contained to invest the trust funds in the purchase of land, could not be validly exercised without Mrs. *Harrison's* consent in writing; and she had not given her consent to the purchase of the copyholds: thirdly, that, as the copyholds were copyholds for lives and not of inheritance, the purchase of them was not authorized by the settlement.

Mr. *Rolt* and Mr. *Follett* appeared for the Defendants.

1849.

TRENCH v. HARRISON.

The VICE-CHANCELLOR:

It is quite true that Mrs. *Harrison* did not give her consent to the purchase of the copyholds; and it is probable that that purchase was not authorized by the settlement: and questions may hereafter arise between Mrs. *Harrison* and the trustees, or between the infant Defendant and the trustees, on those grounds. But they are quite independent of the question, whether, *as between* Harrison *and the trustees*, he must not be considered to have purchased the copyholds for them. And my opinion is that, from the facts found by the *Master*, I cannot avoid coming to that conclusion.

Therefore I shall confirm the report and declare that, as between the trustees and *Harrison's* estate, *Harrison* must be considered to have purchased the copyholds for the petitioners.

UNDERWOOD *v.* JEE.
SMITH *v.* JEE.

1849: 27th March.

Creditors' suit. Staying proceedings in a suit. Injunction.

BOTH these suits were instituted by creditors of an intestate. The bill in the first was filed on the 12th of December 1848, and the answer, on the 29th of February 1849. The bill in the second, was filed on the 27th of December 1848, and the answer on the 25th of January 1849; and, on the 24th of February following,

Two creditors' bills were filed. The first alleged that the Defendant (who was the debtor's widow and personal representative) had carried on the debtor's trade since his decease, and prayed for an account of the profits: the second prayed, merely, for the common relief. The Court held that there was an important difference in favour of the first suit, and refused to stay the proceedings in it, notwithstanding a decree had been obtained in the second.

1849.

UNDERWOOD v. JEE.

SMITH v. JEE.

the common decree in a creditor's suit was obtained in it.

The bill in the first suit alleged, amongst other things, that the Defendant, the widow and administratrix of the intestate, had possessed herself of the intestate's stock in trade and other effects, and carried on and that she still carried on the intestate's trade therewith; that she had wasted and misapplied the assets and neglected and mismanaged the trade, and carried it on at a loss, or, if she had made any gains or profits by carrying it on, that she had applied them to her own use: and it prayed, in addition to the usual relief in a creditor's suit, for an account of the gains and profits (if any) made by the Defendant in carrying on the trade; for an injunction to restrain her from continuing to carry it on; and for a receiver of the intestate's outstanding estate.

Mr. *Miller*, for the Plaintiff, in the second suit, now moved to stay the proceedings in the first, on the ground that a decree had been made in the second.

Mr. *James Parker* and Mr. *Simons* opposed the motion on the ground that the bill in the second suit did not contain any statement or pray any relief with respect to the Defendant having carried on the intestate's trade.

The *Vice-Chancellor* held that the additional matter contained in the first suit, constituted an important difference in its favour; and refused the motion with costs. And the *Lord Chancellor*, on the motion being made before him, pronounced a similar order (*a*).

(*a*) See 1 Hall and Twells, 379; and 1 Macnaght. & Gord. 276.

AFFLECK *v.* JAMES.

1849:
12th July.

Power of sale. Will. Construction.

Testatrix gave, devised and bequeathed all the rest, residue and remainder of her estate real and personal not specifically disposed of by her will, after payment of her debts, &c., to trustees, upon trust *to invest* the same in the funds or on real security, or, at their discretion, *to keep the same in their then state of investment*: and, in a subsequent part of her will, she declared that the receipts of the trustees for the purchase-money of any trust property sold by them under her will, should be good discharges to the purchasers of such property.

Held that the trustees were authorized to sell a real estate comprised in the residuary devise, although all the testatrix's debts, &c., had been paid.

JANE AFFLECK widow, being seised, in fee, of certain copyhold lands situate in the parish of *Burwell* and county of *Cambridge*, and of other real estates, made her will dated the 23rd of August 1841, and thereby appointed her daughter, *Fanny Affleck*, and *John James*, and *Thomas Hodgkinson*, executrix and executors thereof, and *James* and *Hodgkinson* trustees thereof for the purposes thereinafter expressed: and she gave 5000*l.*, to *James* and *Hodgkinson*, upon trust, as soon as conveniently might be after her decease, to *invest* that sum in the funds, and hold it when *invested*, on certain trusts for the benefit of her son and daughter and their children. The testatrix then gave legacies of 1000*l.* each to her son and daughter, and certain farms in *Essex* to *James* and *Hodgkinson*, upon certain trusts for the benefit of her son and daughter and their children. The testatrix next directed that the sum of 2300*l.*, which was then laid out on mortgage of property at *Dedham* in *Essex*, and which she had power to dispose of under the settlement on her marriage with her late husband, should be called in or held *in its then state of investment*, at the discretion of her trustees, and, whether so called in or held as aforesaid, that it should fall into and become part of her residuary personal estate. She then expressed herself as follows:

"And, as to all the rest, residue, and remainder of

1849.

AFFLECK v. JAMES.

my estate, real and personal, of whatever nature or kind the same may consist, not hereby specifically disposed of, and over which I may have or possess any power or control, after payment of my just debts, specific legacies, bequests, funeral and testamentary expences, I give, devise and bequeath the same unto the said *John James* and *Thomas Hodgkinson*, and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor, according to the nature or quality thereof, *upon trust to invest the same in the publick stocks, government funds or real security; or, at their discretion, to keep the same in their present state of investment*; and, as to one moiety of the said residue, to hold the same upon trust to pay the dividends, interest, rents, issues or profits of such moiety, to my said daughter, *Fanny Affleck*, for and during her life, for her separate use and benefit, free from the debts, contracts and engagements of any husband with whom she may intermarry, and her receipt alone, whether covert or sole, to be a good and sufficient discharge for the same; and, from and after her decease, upon trust, as to the said moiety of the said residue, to and for the lawful children of my said daughter, *Fanny*, on their attaining the age of twenty-one years, share and share alike, as tenants in common, or, if only one such child, then for such child, with benefit of survivorship and accruer, of the share or shares of any child dying under the age of twenty-one, to the remaining or surviving children of my said daughter. And upon further trust, in the event of my said daughter dying unmarried or married without leaving children or child who shall, under the aforesaid trusts, become entitled thereto, as to one-half of the said moiety, upon trust as my said daughter, *Fanny Affleck*, shall, absolutely, by deed or will dispose of, direct, limit or appoint the same, and, as to the remaining half of such moiety in such event, upon

1849.

AFFLECK v. JAMES.

trust to and for my said son, *Gilbert Affleck*, his executors, administrators and assigns. And, as to the remaining moiety of my said residuary estate, upon trust to pay the dividends, interest, rents, issues and profits of the said moiety, to my said son, *Gilbert Affleck*, to and for his natural life; and, from and after his decease, upon trust to and for his children or child, such children or child taking a vested interest therein at twenty-one, in such and the like manner and form, with the benefit of survivorship and accruer among and between them, as is declared of and concerning the children of my said daughter, *Fanny*, in the last-mentioned bequest of her moiety of the said residue: And upon further trust, in the event of my said son, *Gilbert Affleck*, dying unmarried or without children or child lawfully begotten who, under the aforesaid trusts, would, after his decease, become entitled to the same, then upon trust, as to one half of the said moiety of my said son of the residuary estate as aforesaid, as he, the said *Gilbert Affleck*, shall, by deed or will, direct, limit or appoint the same; and, as to the other half of such moiety, as my said daughter, *Fanny Affleck*, shall, by deed or will, direct, limit or appoint: Provided always and I hereby direct and declare that it is my wish and intention that, in the event of my son *Gilbert Affleck* becoming possessed, during his life, of the estates under the will of General Sir *James Affleck* deceased, (and I hereby will and direct accordingly) that the moiety or share of the residue to which he will become entitled, and hereinbefore given in trust for the benefit of himself and his children, under this my will, shall revert, go back, belong and be applied to and for the benefit of my daughter, *Fanny Affleck*, and her children or child, or as near thereto as may be, as is declared of and concerning her own share of the residue; and that the actual interest of my said son in

1849.

AFFLECK v. JAMES.

the said residue, and also his contingent interest in the portion of his sister's interest therein, in the event hereinbefore mentioned of my daughter dying unmarried or married without leaving children or child who would, under the said bequest, become entitled to her share, shall cease and determine as to such trust in his favour; and that, from thenceforth, the said moiety of the residue shall, after such event of his succeeding to the said estates, go to her for her life, for her separate use, and, after her decease, to her children or child, in equal shares as tenants in common, and taking a vested interest, and in such and the like manner for the benefit of her children or child, as is hereinbefore declared in relation thereto in the trusts of her moiety, in case of no such event happening; and that, from and after her decease, in such event of my said son so becoming possessed of the said estates, without her having been married or having had children or child who would, under the said trusts, become entitled thereto, the whole of the said residue shall, in such event and accession of my said son as aforesaid, go to and belong to such person or persons, for such ends, intents and purposes as my said daughter, *Fanny Affleck*, shall, by deed or will, appoint absolutely. And, as to my house in *Park Street* wherein I now reside, *and which now forms part of my residuary estate*, from and after my decease, I direct my executrix and executors, at their entire discretion, either to let the same, furnished or unfurnished, for such term or period as they may deem expedient or desirable, *or to cause the leasehold interest in the same to be sold* by public auction or private contract, or to let the same upon lease unfurnished under the powers and authorities in that behalf hereinafter contained."*—The will contained the

* The above extract from the will, was correctly made from the brief.

1849.

AFFLECK v. JAMES.

following amongst other powers; that is to say, a power to the son, during his life, and to the trustees or trustee of the will for the time being, after his decease, to lease all or any part of the thereinbefore devised premises, for twenty-one years: a power to the trustees or trustee for the time being, to lease the house in *Park Street* for the same term: a power to *James* and *Hodgkinson*, or the survivor of them, his heirs, executors and administrators, to give receipts *for the purchase-money of any trust property sold by them under the will*, which should be good discharges to the purchaser of such property: and a power to the trustees or trustee for the time being, to alter and vary the stocks, funds and securities in which *the said trust monies* might be, from time to time, invested, and to invest the same on other government stocks, funds and securities as they might deem expedient; and the will declared that the receipts of the said trustees, or the trustees or trustee for the time being, should be good and sufficient discharges for all monies, matters and things therein expressed, to all persons to whom the same should be given in relation to or connected with the trusts of the will.

The testatrix made three codicils; but did not, by any of them, make any alteration in her will which requires to be noticed, except that, by one of them, she revoked the appointment of *Hodgkinson* to be one of her executors; and, after her decease, he disclaimed all interest in the estates devised to him.

The testatrix died on the 22nd of August 1845, leaving her son and daughter surviving. After her death, her daughter married; and in June 1849 she,

1849.

AFFLECK v. JAMES.

her brother and her child instituted the suit in which this case is intituled, against *James* and her husband. The bill, after stating as above, and that *James* had taken upon himself the execution of the trusts of the will, and had paid all the testatrix's debts, funeral and testamentary expenses and legacies *out of her personal estate*, alleged that *James*, acting, as he alleged, (but which the Plaintiffs by no means admitted,) in execution of the trusts of the will, had contracted to sell the testatrix's copyhold estate in the parish of *Burwell*, comprised in the residuary devise in the will, to one *Samuel Peed*; and that he threatened to complete the sale and to surrender the said copyhold estates to *Peed*: that, according to the true construction of the will, *James*, as trustee thereof, was not authorized or empowered or directed to sell the estates comprised in the residuary devise in the will; and that the same ought not to be sold, but the rents thereof ought to be applied in the manner directed, by the testatrix, with reference to the rents of her residuary real estate. The bill prayed for a declaration that, according to the true construction of the will, the trustees or trustee thereof were not directed or empowered to sell the residuary real estate; and for an injunction to restrain *James* from completing the contract.

James put in a general demurrer.

Mr. *Bethell* and Mr. *Haynes*, in support of the demurrer, referred to *Cornick* v. *Pearce* (*a*).

Mr. *Jessel*, in support of the bill, said that the tes-

(*a*) Decided by V. C. *Wigram*. See 12 Jurist, 997.

1849.

AFFLECK v. JAMES.

tatrix had authorized her trustees, in express terms, to sell her house in *Park Street*, and had noticed it as forming part of her residuary estate, and, therefore, the necessary inference was that that was the only part of her residuary estate, which she intended to be sold; that, she had applied the terms, 'invest,' and, 'investment,' correctly in those parts of her will which related to the sums of 5000*l.* and 3500*l.*; and, if she had not done so and had not authorized, in express terms, a certain part of her residuary estate to be sold, it would be a very forced construction to hold that the words, 'invest' and 'investment,' in the residuary clause, applied to real estates.

The *Vice-Chancellor* said that the trust to invest, authorized, impliedly, a sale of the estates after payment of the testatrix's debts, legacies and funeral and testamentary expenses; and, therefore, that the demurrer must be overruled.

BELL *v.* BELL.

1849: 27th and 30th July, and 3rd August.

Executors and administrators. Retainer. Debt.

IN 1839 *Edward Bell* became indebted to his brother *John Bell*, in 450*l.* In 1841 he was discharged from custody, under the Insolvent Debtors Act, 1 & 2 Vict. c. 110. The 450*l.* remained due from him at the time when he petitioned for his discharge, and he entered it in his schedule. *John Bell* died intestate, in 1847, leaving *Edward* one of his next-of-kin.

One of the creditors of an insolvent died intestate, leaving the insolvent one of his next of kin.

Held that the administrators of the creditor were not entitled to retain the debt, out of the insolvent's distributive share of the creditor's estate.

1849.

BELL
v.
BELL.

In January 1848, the assignees under *Edward's* insolvency, obtained an order, from the Insolvent Debtors' Court, under the 89th section of the Act, requiring *John's* administrators to pay, to them, *Edward's* distributive share of *John's* estate.

The question was whether the administrators were entitled to retain the 450*l.* out of the share.

Mr. *Rolt* and Mr. *Speed*, for the assignees, contended that the administrators had no right to retain the 450*l.*: for *Edward Bell* was neither liable to pay that sum to them, nor entitled to receive, from them, the share of his late brother's estate, but his assignees were entitled to receive it, and, when they had received it, it would be their duty to apportion it amongst his creditors. They referred to the 88th, 89th and 91st sections of the Act, and relied on *Cherry* v. *Boultbee* (*a*) as being conclusive against the claim made by administrators. They cited also *Ex parte Man* (*b*).

Mr. *Bethell* and Mr. *Cotton*, contra, said that, *Cherry* v. *Boultbee* was a case of bankruptcy and not a case of insolvency: that the adjudication, of the Commissioners, that an insolvent was entitled to his discharge, did not bar his debts, but that his future property remained liable to the payment of them: that, wherever there was a right of suit, there was a right of retainer; and, that being the case, the insolvent was entitled only to the share of his brother's estate after the 450*l.* had been retained out of it; and, as his assignees could claim nothing more than belonged to him, they were not entitled to more than the balance of the share, after the

(*a*) 4 Myl. & Cr. 442. (*b*) Mont. & Macarthur, 210.

450*l.* had been subtracted from it: *Jellis* v. *Mountford* (*c*).

1849.

BELL
v.
BELL.

The VICE-CHANCELLOR:

I have looked at the cases which were cited in the course of the argument; and I think that, after what the *Lord Chancellor* has said in *Cherry* v. *Boultbee*, the claim made by the intestate's personal representatives, cannot be supported; and, therefore, I shall declare that the assignees of the insolvent, are entitled to receive the full amount of the insolvent's distributive share of his late brother's estate.

(*c*) 4 Barn. & Ald. 256.

GIBSON *v.* HALE.

1849:
3rd August.

Legacy.
Substitution.
Will.
Construction.

JOHN WINTERBOTTOM made his will, dated *Barbadoes*, 25th November 1838, and in the following words:

"I bequeath to my wife, *Penelope Winterbottom*, the

Testator gave the whole of his personal property, after payment of his debts, to his wife during her widowhood; remainder to his son, his only child; and, if his son should die under twenty-one, he expressed it to be his wish to give 500*l.* to each of his brothers and sister, *Joseph*, *James* and *Mary*, "and *any further surplus* to be equally divided between these, my said brothers and sister, *or their legal heirs and successors.*" The testator's son survived him and died under twenty-one. His brother *Joseph* died in his lifetime.

Held that the gift of the further surplus was not a residuary gift, but was a gift of the surplus of the testator's property after the three sums of 500*l.* each should be subtracted from it: and that the legal heirs and successors of the brothers and sister were not intended to take unless *all of them* died so as not to take; and, consequently, that there was an intestacy as to the 500*l.* and the share of the further surplus given to *Joseph*.

1849.

GIBSON v. HALE.

whole of my personal property after all my legal debts are paid, to be retained by her during the period she remains a widow, to be used by her for her own support and the education and maintenance of my son, *Edward Winterbottom*. In the event of my widow re-marrying or dying, the whole of the said property to devolve upon my son, *Edward Winterbottom*: in the event of my son *Edward Winterbottom* dying before he attains the age of twenty-one, then it is my wish to bequeath the sum of 500*l*. each, to my brothers *James Winterbottom, Joseph Winterbottom* and to my sister, *Mary Winterbottom*; and *any further surplus* to be equally divided between these, my said brothers and sister, *or their legal heirs and successors*. This I declare to be my last will and testament."

The testator made a codicil without date and in the following words: "As a codicil to this my last will and testament—it is my wish that Captain *Edgar Gibson*, 52nd Regiment, and Lieut. *E. Pocklington*, 52nd Regiment, should be invited to perform the duties of executors in conjunction with my wife, *Penelope Winterbottom*."

The testator died on the 26th of November 1838, leaving his wife, *Penelope Winterbottom*, and his son *Edward Winterbottom*, his sole next-of-kin, him surviving. His wife died on the 28th of November 1838: the Defendant, *Mary Caroline Hale*, was her personal representative.

Edward Winterbottom, the testator's son, died on the 2nd of June 1846, under twenty-one and intestate; and *Mary Caroline Hale* was his personal representative also.

1849.

GIBSON v. HALE.

Joseph Winterbottom, one of the testator's brothers, died in 1811. *Betty Hughes* was his only surviving child and next-of-kin at the time of the testator's decease; and, in 1849, she took out letters of administration to his estate.

The bill, which was filed, by the testator's executors, against *Mary Caroline Hale*, the testator's brother and sister, *James* and *Mary*, and *Betty Hughes*, prayed that the rights and interests of the several parties entitled to and interested in the sum of stock (in which the Plaintiffs had invested the residue of the testator's estate after payment of his funeral and testamentary expenses and debts) might be ascertained and declared.

The Cause was heard in November 1848; and, the *Master* having made his report in pursuance of the decree, the Cause now came on to be heard for further directions as a short Cause.

Mr. *Bethell* and Mr. *Giffard*, for the Plaintiffs, observed that the will was within the operation of the New Will Act, 7 Will. IV. & 1 Vict. c. 26; and, therefore, it must be construed to speak and take effect as if it had been executed immediately before the death of the testator.*

Mr. *James Parker* and Mr. *Cox*, for *Mary Caroline Hale*, the personal representative of the testator's widow and son, said, first, that there could be no doubt that the legacy of 500*l.*, expressed, by the will, to be given to *Joseph Winterbottom*, had lapsed: secondly, that the

* See sect. 24.

1849.

GIBSON v. HALE.

will did not contain any general residuary bequest; but that it contained only a gift of, "any further surplus;" which words meant, the surplus of the testator's property after the three sums of 500*l.* each, bequeathed to his brothers and sister, had been taken out of it; and lastly, that, as the gift of the surplus was intended to take effect, not *at the testator's death, but at a future period*, namely, on the testator's widow re-marrying or dying, and his son dying under twenty-one, the words: "or their legal heirs or successors," (whatever might be their meaning) were not, according to the principle of *Tidwell* v. *Ariel* (*a*), substitutional, and, consequently, and as there was no residuary bequest, the third of the surplus as well as the 500*l.* intended for *Joseph Winterbottom* was undisposed of and belonged to the testator's next-of-kin. They referred also to *Gittings* v. *Macdermott* (*b*), which they said was decided on the same principle as *Tidwell* v. *Ariel*; and also to *Waite* v. *Templer* (*c*).

Mr. *Stuart* and Mr. *Miller*, for the testator's brother and sister *James* and *Mary*,* said that, unless *Tidwell* v. *Ariel* and *Waite* v. *Templer* were wrongly decided, it was impossible to support the claim made by the personal representative of *Joseph Winterbottom*: and they cited *Corbyn* v. *French* (*d*).

Mr. *Rolt*, for *Betty Hughes*, the next-of-kin and personal representative of *Joseph Winterbottom*, contended, first, that the word, 'surplus,' was equivalent to, 'residue;' and, therefore, the gift of the surplus was a

(*a*) 3 Madd. 403.
(*b*) 2 Myl. & Keen, 69.
(*c*) *Ante*, Vol. II., page 524.
(*d*) 4 Ves. 418.

* *Mary* was married to *Edward Hale*, but he was out of the jurisdiction and had deserted her.

1849.

GIBSON v. HALE.

residuary gift; secondly, that the words, "*or* their legal heirs and successors," were, clearly, substitutional, and, according to *Vaux* v. *Henderson* (*d*), meant the next-of-kin of the testator's brothers and sister at the testator's death; and, lastly, that the testator intended such next-of-kin to take, not (as Mr. *Parker* had contended) in the event only of his brothers and sister dying in his lifetime, but in that event and also in the event of their surviving him and dying in the lifetimes of his widow and son: and he referred to *Christopherson* v. *Naylor* (*e*).

The VICE-CHANCELLOR:

With respect to the first point, my opinion is that the gift of the 500*l.* to *Joseph Winterbottom* has totally failed in consequence of his having died before the testator.

With respect to the second point, my opinion is that the expression, 'further surplus,' means that surplus which shall remain after the subtraction of the three sums of 500*l.* I think that is perfectly plain.

Then, with respect to the third point, it has been argued as if the words, "or their legal heirs and successors," necessarily implied that there was to be a distribution, and that they point to the case of there being one of the three dying so as not to take, or two of the three dying so as not to take, or to the real case to which the words apply, namely, the case of all three dying so as not to take. Now my opinion is that, when the testator directed that any further surplus should be equally divided between his said brothers and sister, that was a clear

(*d*) 1 Jac. & Walk. 388, note. (*e*) 1 Mer. 320.

1849.

GIBSON v. HALE.

gift whereby they would take as tenants in common. Then the next words are, "or their legal heirs and successors;" which, clearly, do not, themselves, necessarily imply that, in the event of one only dying so as not to take, the legal heirs and successors (whatever those words may mean) of that one are to take distributively with the other two: and so if two had died so as not to take, there is no necessary implication, derivable from these words, that the legal heirs and successors of the two should take. But it is a gift to the three, if the three can take; and it is a gift to their legal heirs and successors, if they are to be substituted; that is, if any persons are to take in lieu of the three, then it must be their legal heirs and successors; for there is no gift, to the legal heirs and successors, other than that which is exactly similar to the original gift.

My opinion, therefore, is that, there being a gift to the three as tenants in common, and one of them having died, the heirs and successors of that one, are not entitled; but there is an intestacy as to the share which he was intended to take.

Declare that, according to the true construction of the will of *John Winterbottom* deceased, the testator in the pleadings named, and in the events which have happened, the legacy of 500*l.* and the one-third of the further surplus thereby bequeathed to his brother *Joseph*, (who died before the making of the said will,) lapsed and became payable in manner following, that is to say, one third part thereof to *Penelope Winterbottom*, since deceased, the said testator's widow, and the remaining two third parts thereof, to *Edward Winter-*

1849.

GIBSON v. HALE.

bottom since deceased, the said testator's only child and next-of-kin living at the time of his death: And this Court doth declare that the sum of 292*l.* 8*s.* 2*d.* which arose from the sale of 300*l.* 8*s.* 3*d.* Bank £3 per Cent. Annuities, part of the capital of the said testator's estate, and was applied, by the Plaintiffs, for the advancement in the world of the said *Edward Winterbottom* deceased as in the pleadings mentioned, ought to be treated as part of the said *Edward Winterbottom's* said share of the said legacy and further surplus, according to the directions hereinafter mentioned: And this Court doth order that the Plaintiffs, the executors of the said testator, do pay the legacy duty payable under his will, and retain the same out of the shares, hereinafter mentioned, of the parties liable to pay the same: And it is ordered that it be referred to the *Taxing Master* of this Court in rotation, to tax all parties their costs of this suit as between solicitor and client, and also to tax the Plaintiffs their costs, charges and expenses (if any) properly incurred, beyond the costs of this suit, in executing the trusts of the said testator's will; and also to tax, as between solicitor and client, the Defendant, *Betty Hughes*, her costs of taking out letters of administration to her father, the said *Joseph Winterbottom* deceased: And it is ordered, that the said Plaintiffs do sell the 1800*l.* Bank £3 per Cent. Annuities standing in their names in the books of the Governor and Company of the Bank of *England*; and, out of the money to arise by the said sale, it is ordered that the said costs and costs, charges and expenses, when taxed, be paid to the solicitors of the respective parties: And it is ordered that the said Plaintiffs do divide and pay the residue of the monies to arise by the said sale, and also the sum of 113*l.* 4*s.* 3*d.* cash in their hands, being the residue of the past interest on the said Bank Annuities after

1849.

GIBSON v. HALE.

deducting the payments made thereout by the Plaintiffs as in the pleadings mentioned, in manner hereinafter directed; that is to say, it is ordered that the said Plaintiffs do pay one third part of the said residue and cash, after deducting, from such one third part, the sum of 194*l.* 18*s.* 10*d.* being two third parts of the said sum of 292*l.* 8*s.* 2*d.*, and after retaining the proportion of the said legacy duty payable by the said *Edward Winterbottom* deceased, to the Defendant, *Mary Caroline Hale*, as the legal personal representative of the said *Penelope Winterbottom* and *Edward Winterbottom* deceased: and it is ordered that the said Plaintiffs do pay one other third part of the said residue and cash, and also the sum of 97*l.* 9*s.* 5*d.*, being a moiety of the said sum of 194*l.* 18*s.* 10*d.*, to the Defendant, *James Winterbottom*, after retaining, thereout, the proportion of the said legacy duty payable by him: And, out of the remaining one third part of the said residue and cash, it is ordered that the said Plaintiffs do pay the sum of 50*l.* to the Defendant, *Mary Hale*, for her separate use, on account of the interest accrued due from and since the 2nd day of June 1846, the time of the death of the said *Edward Winterbottom*, on her legacy of 500*l.* and her one third of the said further surplus: and it is ordered that the said Plaintiffs do, on or before the 2nd day of November next, pay the residue (after deducting the proportion of the said legacy duty payable by the said Defendant, *Mary Hale*, and the said sum of 50*l.*) of the last-mentioned one third part of the said residue and cash, and the further sum of 97*l.* 9*s.* 5*d.*; being the other moiety of the said sum of 194*l.* 18*s.* 10*d.* (the amount to be verified by affidavit) into the Bank, in the name and with the privity of the *Accountant-General* of this Court, in trust in this Cause, to an account to be entitled, "The account of the Defendant, *Mary*, the

wife of *Edward Hale*," with liberty, to the said Defendant, *Mary Hale*, to apply, to this Court, concerning the same as she may be advised; and any of the parties are to be at liberty to apply to this Court as there shall be occasion.

1849.
GIBSON
v.
HALE.

Reg. Lib. B. 1848, fo. 2225.

THE ATTORNEY-GENERAL *v.* THE WARDEN, CONFRATER AND POOR PERSONS OF BROWNE'S HOSPITAL.

1849: 7th and 9th November, and 3rd December.

Charity. Visitor. Construction.

LETTERS patent were granted by *Richard* III. in the second year of his reign, by which, after reciting that *William Browne* had, at his own charge, lately erected a certain chapel and divers other houses and edifices within the town of *Stamford*, for a certain almshouse there to be made, and proposed, with the license of his said Majesty, to found and establish a certain perpetual almshouse there, *as well for divers chaplains to celebrate divine service therein*, as for divers poor, of each sex,

In the reign of *Henry* VII. a hospital was founded at *Stamford*, by *W. Browne*, for a Warden, Confrater, and twelve poor persons. By letters patent of *James* I. the Hospital was incorporated by the name of the Warden, Confrater, and poor persons of the Hospital: and his Majesty granted that the Bishop of *Lincoln* for the time being, should, from time to time, revise, examine, and inquire into the ancient statutes of the Hospital, and abolish so many of them as were repugnant to the laws of *England*, and make other statutes as well concerning the divine service to be celebrated in the Hospital, *as concerning the government and direction of the Warden, Confrater, and poor to be supported in the Hospital*, as should appear to the Bishop to be salutary, not being repugnant or derogatory to the ancient statutes of the Hospital, or to the laws of *England*; and to revoke, alter or make anew, as to the Bishop should, from time to time, appear more expedient, all and each or any of them so made or to be made anew. Held that a general, visitatorial power was not given to the Bishop, but that the revenues of the Hospital were subject to the jurisdiction of the Court.

1849.

THE ATT.-GENERAL v. BROWNE'S HOSPITAL.

there to be sustained and relieved: His said Majesty granted and gave license that the said *William*, or his executors, should be able to found and establish a certain almshouse, to continue in future for ever at *Stamford* aforesaid, of one Warden, a secular Chaplain, and of one Confrater of the said house, likewise being a secular Chaplain, according to the ordinance of the said *William* or of his executors in that behalf to be made, *to perform divine service and to pray for the good estate of his said Majesty and of his consort*, Anne, *Queen of* England, during their lives, and, afterwards, *for their souls, and also for the good estate of the said* William *and* Margaret *his wife whilst they should live, and for their souls and for the souls of all faithful departed*: And his said Majesty thereby willed that, after the almshouse should be erected and established, it should be called: "The Almshouse of *William Browne* in *Stamford* in the County of *Lincoln*," for ever; and that the Warden and Confrater and their successors, should be, for ever, called: "Wardens and Confraters of the Almshouse of *William Browne* of *Stamford* in the County of *Lincoln*," and should be a body corporate: And, for the perpetual continuance of the almshouse and also for the relief and sustentation as well of the Warden and Confrater and their successors, as of divers poor of each sex there, in like manner, to be found and sustained, according to the ordinance of the said *William* or his executors there likewise, in the form aforesaid, to pray, and, for other charges and chargeable works according to the ordinance of the said *William* or his executors to be supported, his said Majesty thereby granted that the said *William* or his executors, or any other person whosoever, after the almshouse should be so erected and established, should be able to give, grant, alien, leave or assign, to the Warden and Confrater and their suc-

cessors, land and other hereditaments whatsoever, to the annual value of fifty marks beyond reprizes, which were not immediately held of his said Majesty; to hold to them and their successors for ever: And his said Majesty likewise gave license, to the Warden and Confrater and their successors, that they, such lands and hereditaments from the aforesaid *William* or his executors or other persons whomsoever, should be able to receive; to hold to them and their successors for ever; but so, nevertheless, that it be found by inquisition that the same might be done without damage or prejudice of his said Majesty or his heirs, or of any others whomsoever.

Browne died without having completed the establishment of the almshouse, having, by his will, dated in 1488, appointed his wife his executrix. She died shortly afterwards, having appointed *Thomas Stokke* her executor.

Charter of *Henry* VII.

Letters patent were granted by *Henry* VII. in the second year of his reign, by which, after reciting the erection, by *Browne*, of the chapel and other edifices, and his proposal to establish an almshouse there in like manner as was recited in the original letters patent, but without, in any way, referring to the same; and that, before he was able, by the medium of his said Majesty's license,* to establish that almshouse, he was, by the prevention of death, taken away from this world: His said Majesty thereby granted and gave license to *Stokke*, (who was therein described as the brother of Mrs. *Margaret Browne*, relict of the said *William Browne*, and executrix of the testament of the said *William Browne*,) and his executors, the like power to found and establish the said almshouse, and with the like provisions as were

* *Sic.* in brief.

1849.

THE ATT.-GENERAL v. BROWNE'S HOSPITAL.

contained in the original letters patent; save that the prayers thereby enjoined were to be for his Majesty King *Henry* VII. and his Queen, *Reginald Bray* and his wife, the said *Thomas Stokke*, *Elizabeth Elmes* and *William Elmes*, and their souls respectively.

Shortly after the date of those letters patent, *Stokke* conveyed, to the then Warden and Confrater of the almshouse, a manor and other hereditaments to the value of 30*l. per annum*; and there was indorsed, on the letters patent, a memorandum stating that, on the 5th of February in the 9th *Henry* VII., the Warden and Confrater purchased the said manor and other hereditaments, from *Stokke*, by pretext of the therein within written license: to hold to them and their successors in part satisfaction of the fifty marks of lands within written.

Statutes made by *Thomas Stokke*.

Thomas Stokke executed a deed dated the 9th of October 1495 whereby, after reciting that, by virtue of the letters patent of *Henry* VII., he had founded a certain almshouse, at *Stamford*, of a Warden, *being a secular priest*, and one brother of the same house, *likewise being a secular priest*, after his ordinance or the ordinance of his executors *to celebrate divine service for evermore*, and to pray for the state of the King and of Queen *Elizabeth* and other persons mentioned in the said license; and that he had instituted certain persons, therein mentioned and described as secular priests, to be the first Warden and Confrater of the same; and had set them in real possession of the same Bedehouse: and that, by virtue of the said letters patent, he had reserved to him, during his life, authority over the Bedehouse and the Warden and Confrater, to make other ordinances, or withdraw and alter the same at will, as

therein more particularly mentioned: he, by the now stating deed, made certain statutes; the second of which was that, from thenceforth ever in time to come, there should be, in the almshouse, one Warden and Confrater, and twelve Bedefolks, that is to say, ten men and two women, under the reasonable rule and government of the Warden and Confrater and their successors. The third and fourth statutes provided for the taking, on their admission respectively, by the Warden, Confrater and Bedefolk, of certain oaths; which, after the deaths of *Stokke* and *William Elmes*, were to be taken *before the Dean of* Stamford *for the time being, or before the Vicar of* All Hallowes *in* Stamford. By the 5th statute, in case, after the deaths of *Stokke* and *Elmes*, the Warden, Confrater, or any of the Bedefolk should die or be removed or depart from the house, the right of supplying the vacancies thereby occasioned, was given, first, *to the Dean of* Stamford *and Vicar of* All Hallowes *for the time being*; then to the heirs of *Browne* and their heirs; then to the Alderman of *Stamford* and the Abbot of *Crowland* for the time being; *then to the Bishop of* Lincoln *for the time being*. The 13th and 14th statutes provided for the daily celebration of divine service, by the Warden and Confrater, or one of them, either in the Chapel of the almshouse, or in the parish Church of *All Hallowes, Stamford*, and for the attendance of the Bedefolks thereat. The 18th and 19th statutes ordered that the Warden and Confrater should have a common seal and a common chest for them and the Bedemen, in which should be kept the common seal and all the deeds, letters, privileges, writings and treasures of the almshouse, and to be kept in a secret and sure place within the building of the house; and that, to the chest, there should be three keys having divers locks, of which one

1849.

THE ATT.-GENERAL v. BROWNE'S HOSPITAL.

should, after the death of *Stokhe*, remain with the Vicar of *All Hallowes*, another, with the Warden, and the other, with one of the Bedemen; and that nothing should be sealed with the common seal, without the license of all the keepers of the keys. The 18th statute ordered *that the Warden should have the government of the house*, and of the Confrater and Bedemen, *and also the administration of all the rents and goods of the house*; and that, after the admission of any Warden in time to come, before he meddled with any administration in the same, he should make an inventory of all the goods of the house, after the death of *Stokke* and *William Elmes*, in the presence of the Vicar of *All Hallowes* and two of the Bedemen that were most discreet; that every Warden, every year within one month next after the feast of St. *Michael the Archangel*, should be bound to give a faithful account *of all his administration of and in the rents and goods of the almshouse*, after the decease of *Stokke* and *William Elmes*, before *the Vicar of All Hallowes* and the Confrater and two of the most discreet Bedemen; *which Vicar* Stokke *ordained chief supervisor* of every account; and the same Vicar to have, for his labour, five marks of the surplus rents at the making of every such account; and, if the Vicar were negligent, then that the pension should be withdrawn for that time, and half thereof be given to the Dean of *Stamford*, that he might take the charge of the Vicar in the premises, the other half of the said pension being reserved unto the necessary uses of the almshouse; and, the said account yearly made and ended, the Warden, in the presence of the keeper of the keys, was to inclose, in the common chest, as well the book of his account, as all the money remaining overplus of the rents beyond all charges of the same, and beside the pension assigned

as aforesaid. The 23rd statute ordained *that the default as well of the Warden as of the Confrater, should be reformed, corrected and punished*, after the death of *Stokke* and *Elmes, by the Dean of* Stamford *and the Vicar of All Hallowes*, that is, as well by the withdrawing the pension of the Warden and Confrater by a week, or more or less after the quality and quantity of the trespass, by the discretion of the said correctors, *as by privation and amotion from their office*, if the frowardness asked the same. The 24th statute provided for the appointment of a Chaplain to perform divine service, during the illness of either the Warden or the Confrater. The 30th statute imposed certain penalties on the Warden, Confrater and Bedefolk, in case they should absent themselves from the almshouse; the Confrater and the Bedefolk, without the license of the Warden, and the Warden without the license of the Vicar of *All Hallowes*. The 31st statute prohibited the Warden and Confrater from alienating the lands of the hospital, unless by way of exchange, and then, after the decease of *Stokke* and *Elmes*, not without the license of the said Dean and Vicar. The 32nd and 33rd statutes directed that the statutes should be read, in the chapel of the almshouse, four times a year; and that the constitution, thereby established, should never be altered.

Charter of *James* I.

Letters patent were granted by King *James* I., dated 4th May, in the eighth year of his reign, whereby, after reciting the erection, in the time of *Richard* III., by *William Browne*, of the chapel and other houses and edifices for the founding of the almshouse, and his intention to establish there a certain perpetual almshouse, as well for divers Chaplains to perform divine offices in the chapel, as for divers poor of each sex there

1849.

THE ATT.-GENERAL v. BROWNE'S HOSPITAL.

to be supported and maintained; and that he had been taken away from this life, before he could establish the same; and after reciting the letters patent of *Henry* VII., but without noticing the original letters patent of *Richard* III.; and after reciting that the almshouse had been founded according to the tenor of the letters patent of *Henry* VII., and that divers lands, tenements and hereditaments had, by divers persons, been given, left, acquired or conveyed for and towards the perpetual maintenance of the almshouse, and for the support and maintenance of the Warden, Confrater and poor to be maintained and supported in the house; and that some persons discovering some defect and invalidity in the letters patent of *Henry* VII. and other conveyances aforesaid, had, of late, endeavoured wholly to overturn the estate of the almshouse, and to transfer to their own private advantage the possessions of the same; and that they might the more bring to effect their endeavours, had laboured to acquire, to themselves, the beforementioned lands, tenements and hereditaments under his said Majesty's right and title: His said Majesty granted that the house, then commonly called the almshouse of *Stamford*, should be and remain, thenceforth for ever, a hospital of poor persons in *Stamford*, for the support, relief and maintenance of poor persons of each sex; and that the said hospital, for ever, should be or might be and consist of one Warden, one Confrater, ten poor men and two women to be found and maintained in the hospital for ever, and that the hospital, thenceforth for ever, should be called: "The Hospital of *William Browne* of *Stamford* in the County of *Lincoln*, of the foundation of *James* King of *England*:" And his said Majesty did, thereby, create, found and establish the said Warden and Confrater, poor men and poor women by the name of: "The Warden, Confrater

1849.

THE ATT.-GENERAL v. BROWNE'S HOSPITAL.

and poor of the Hospital of *William Browne* of *Stamford* in the county of *Lincoln* of the foundation of *James* King of *England*;" and that, thenceforth for ever, there should be, in the hospital, two Chaplains, whereof one should be called the Warden of the hospital, and the other, the Confrater thereof, and should be called, Warden and Confrater of all the lands, tenements, rents and hereditaments, goods and chattels of the hospital; and should be called :* "The Warden and Confrater of the Hospital of *William Browne* of *Stamford* in the county of *Lincoln* of the foundation of *James* King of *England*;" and that, thenceforth in all future times, there should be, in the hospital, ten poor and needy men advanced in age and two women also advanced in age, to be there supported, maintained and relieved; who, in like manner, should be called: "The poor of the Hospital:" and, for the better performance of his Majesty's grant, his Majesty nominated and appointed that two persons therein named and therein described as Clerks, should be, one the first Warden of the hospital, and the other the first Confrater thereof; and, furthermore, that twelve poor persons therein named, ten of them being men and two women, should be the first twelve poor persons of the hospital; and his Majesty appointed that the Warden, Confrater and poor persons of the hospital and their successors, should be, thenceforth for ever, one body corporate and politic, by the name of the Warden, Confrater and Poor persons of the hospital of *William Browne* in *Stamford* in the county of *Lincoln*, of the foundation of *James* King of *England*: and his Majesty did incorporate them, accordingly, by the name aforesaid, with provision for their perpetual succession, and with capacity to acquire and possess lands and other hereditaments, goods and chattels for the sustentation, maintenance and

* *Sic.*

1849.

THE ATT.-GENERAL v. BROWNE'S HOSPITAL.

support of the hospital, and of the aforesaid Warden, Confrater and poor to be therein from time to time dwelling and maintained in manner therein more at large set forth. And his Majesty thereby granted and ordained, in effect, that when and as often as it should thereafter happen that any of the Warden, Confrater and twelve poor persons of the hospital, should die or be removed from the hospital, for any cause according to the ordinances theretofore made or thereafter to be made for the government of the hospital, or should, by any other means, be removed from the house, or should voluntarily depart entirely from thence, then and so often, the Dean of *Stamford* and the Vicar of *All Saints*, theretofore called *All Hallowes*, for the time being, or, on their neglect, the heirs of *Browne* and their heirs, or, on their neglect to nominate, the Alderman of *Stamford*, and, on his neglect, *the Bishop of* Lincoln *for the time being*, should nominate and put in possession another fit person and of the same sex, in the place of the party so dying, removed or departing. And his Majesty also granted that all the statutes and ordinances theretofore constituted by *Stokke*, should, thenceforth for ever, stand, continue and remain in full force and vigour; and that they should be respected and accepted in all things and in all respects stable and firm according to the tenor and effect of the same, so far as the said statutes or ordinances might be agreeable to the laws or statutes of his Majesty's kingdom of *England*, and not contrary or repugnant to the said laws or statutes; which said laws, statutes, and ordinances made, declared and ordained by *Stokke* as before mentioned, so far as the same were not contrary or repugnant to the laws or statutes of the kingdom of *England*, his Majesty did confirm, ratify, and approve. And his Majesty granted *that the Bishop*

1849.

THE ATT.-GENERAL v. BROWNE'S HOSPITAL.

of Lincoln *for the time being*, with the assistance and consent of the Archbishop of *Canterbury* for the time being, should, from time to time, *revise, examine, and inquire into the ancient statutes, laws, ordinances and constitutions of the almshouse; and so many and such only of the same as, and as far as the same were repugnant to the laws and statutes of his Majesty's kingdom of* England, *should, thoroughly, take away, abolish and obliterate, to the intent that they should not be, thereafter, put to use or execution*; *and also make and constitute so many, such and other like good, fit and salutary statutes, laws, ordinances and constitutions in writing, as well concerning the divine service daily to be celebrated in honour of God in the hospital, as concerning the government and direction of the Warden, Confrater and poor to be supported in the hospital, as and which should appear, to the Bishop, with the assistance and consent of the Archbishop, good, useful, fit and salutary,* not being contrary nor repugnant or derogatory to the ancient statutes, ordinances and constitutions of the hospital theretofore made, so far as the said ancient statutes, ordinances and constitutions were not contrary or repugnant to the laws or statutes of the kingdom of *England*; *and to revoke, change, determine, augment, alter or make anew, as to the Bishop* should, from time to time, appear more expedient, all and each of them or any of them so made or to be made anew,* according to the real meaning of his Majesty's letters patent; which said statutes, laws, ordinances, and constitutions, so to be made and constituted as before mentioned, his Majesty granted, enjoined and commanded that they should be from time to time in future, inviolably observed, kept

* The words, "with the assistance and consent of the Archbishop of *Canterbury* for the time being" were not inserted in the letters patent as set forth in the brief.

1849.

THE ATT.-GENERAL v. BROWNE'S HOSPITAL.

and performed; provided, nevertheless, that the statutes, laws, ordinances and constitutions to be made, constituted and ordained as before mentioned, were not contrary or repugnant to the laws or statutes of his Majesty's kingdom of *England*, nor to the ancient statutes, ordinances and constitutions of the hospital so far as the said ancient statutes, ordinances and constitutions of the hospital were not contrary or repugnant to the laws or statutes of his Majesty's kingdom of *England*. And his Majesty granted, to the hospital, all the lands and other hereditaments, in *Stamford* or elsewhere within *England*, which the Warden, Confrater and poor of the almshouse, had, in fact, if not by right, quietly enjoyed for sixty years then last past preceding the date of the now stating letters patent.

Information.

The information was filed against the Warden, Confrater and poor persons of the hospital as a body corporate, and the Warden and Confrater as individuals, and also against the Bishop of *Lincoln*, the Dean of *Stamford*, and the Vicar of *All Saints* (formerly called *All Hallowes*), and the Mayor of *Stamford*, (who, under some of the alterations made in the statutes of the hospital, had been substituted for the Alderman of *Stamford* and the Abbot of *Crowland*,) and after stating as above, it alleged that the letters patent of *James* the First, constituted the governing charter of the hospital, which had ever since existed under the authority of the same; and that, since the date of them, the hospital had acquired additional possessions, by gift and otherwise; and that the income of the charity was much more than sufficient for the maintenance of the charity according to the original foundation thereof and the charitable purposes of the founders. It further appeared, from the information, that under the authority

1849.

THE ATT.-GENERAL v. BROWNE'S HOSPITAL.

of the letters patent of *James* the First, the Bishops of *Lincoln*, in 1674, 1709, 1765, and 1828, had *visited* the hospital, and, with the advice and assistance of the Archbishop of *Canterbury* for the time being, revised the statutes of it, and made alterations therein with regard (amongst other matters) to the letting of the estates and the distribution of the revenues of the charity amongst the objects of it. The information next stated that, since the establishment of the hospital, the possessions thereof had been greatly augmented, and that they were annually increasing in value; and that, even taking the annual revenue of the hospital at the then amount thereof, the income of the same was much more than sufficient for the maintenance of the charity according to the original foundation thereof and the charitable purposes of the founders: that the authority given, by the letters patent of *James* the First, to the Bishop of *Lincoln* for the time being, to make and constitute statutes, either concerning the divine service in the hospital, or concerning the government and direction of the Warden, Confrater and poor of the hospital, *did not authorize the Bishop to make statutes concerning the distribution of the revenues of the hospital, or, at all events, did not authorize him to direct any distribution of such revenues, which should be contrary or repugnant, or derogatory to the ancient statutes of the hospital relating to such distribution*: that it was not practicable to trace *Browne's* heirs: that it would be expedient for the better regulation of the charity, that the powers conferred, on the Bishop of *Lincoln* for the time being, by the letters patent of *James* the First, should be ascertained and accurately defined by the Court; and that it should be also ascertained and declared in whom the powers of visitor of the charity were vested.

1849.

THE ATT.-GENERAL v. BROWNE'S HOSPITAL.

The information prayed, amongst other things, *that the charity might be regulated by the Court*: that the powers and authorities vested in the Bishop of *Lincoln* for the time being, under the letters patent of *James* the First, might be ascertained and defined by the Court, and such declarations made in reference thereto as might be necessary for that purpose: that a scheme might be settled, by the Court, for the future government of the charity, and of the persons entitled to the benefits thereof, and for the distribution and appropriation of the revenues of the charity: that provision might be made, in such scheme, for the future letting of the charity lands without fines: that it might be ascertained in whom the general powers of visitor of the charity were vested; and that it might be also ascertained whether the then estates and property of the charity were more than sufficient to fully satisfy all the purposes of it, according to the original intention of the founders thereof; and, if the same should appear to be more than sufficient for those purposes, then that due provision might be made for the application of the surplus revenues.

Answer of the Bishop of *Lincoln*.

The answer of the Bishop of *Lincoln* stated that an improved system of letting the charity estates had been adopted of late years; and that, thereby, a smaller fine was taken and a larger rent reserved on the renewal of every lease; and that it was the intention, of the then Warden, to carry on and gradually extend the said system until the whole of the estates were let at rack-rents: and that, as soon as the permanent income of the charity should be increased to such an extent as to make the provisions made by the then existing statutes, for the Warden and Confrater, more than sufficient, *in the opinion of the Defendant*, for them, he, if

he should then be Bishop of *Lincoln* and unless the Court should be of opinion that he had no power to do so, *would again revise the statutes, and direct a different application of the revenues of the hospital and such as, in his opinion,* would be most for the benefit of the charity, having regard to the increased revenues of the same: that, in 1846, doubts were raised as to whether the Bishops of *Lincoln* by whom the statutes had been revised, had not, in their respective revisions, exceeded the powers given to them by the letters patent of *James* the First; and that, in consequence of such doubts, the Defendant was unwilling to interfere in the affairs of the hospital until the same had been removed, and the nature and extent of the powers given to the Bishop of *Lincoln* for the time being, by the said letters patent, had been ascertained and defined by competent authority; but that no doubts were ever before raised as to the nature and extent of the powers given, by those letters patent, to the Bishop of *Lincoln* for the time being; and that the Defendant and his predecessors had exercised those powers in the manner and to the extent before mentioned, without any doubt or question being so raised as to their right so to do. And the Defendant submitted, to the judgment of the Court, whether or not, according to the true construction of the letters patent of *James* the First, the Bishop of *Lincoln* for the time being, with the assistance and consent of the Archbishop of *Canterbury* for the time being, had the power of making statutes for the regulation and government of the charity *and the distribution of its revenues* in the manner and to the extent in the information mentioned. And the Defendant claimed, for himself and his successors, Bishops of *Lincoln*, all such powers, rights and authorities whatsoever, as, by the letters

1849.

THE ATT.-GENERAL v. BROWNE'S HOSPITAL.

patent of *James* the First, were given to or vested in the Bishop of *Lincoln* for the time being.

The Cause now came on to be heard.

Argument.

Mr. *Rolt* and Mr. *Goodeve*, for the Relators, said that the only subjects with regard to which the Bishop of *Lincoln* had any authority to make statutes, laws, ordinances and constitutions, were the divine service to be daily celebrated in the hospital, and the government and direction of the Warden, Confrater and Poor of it; and, therefore, he had no right to interfere with the management of the property or the distribution of the revenues of the hospital.

Mr. *Bethell* and Mr. *Nevinson*, appeared for the hospital and for the Warden and Confrater of it.

Mr. *James Parker* and Mr. *Craig* for the Vicar of *All Saints*.

Mr. *James* for the Mayor of *Stamford*.

Mr. *Roundell Palmer* and Mr. *Wright* for the Bishop of *Lincoln*, contended that the Bishops of that see for the time being, had a general, visitatorial power over the hospital, and the possessions and revenues of it. They said that the hospital was founded for spiritual as well as eleemosynary purposes; and, therefore, it was visitable by the Bishop of the diocese: that the law on this subject, was concisely stated by Mr. Justice *Blackstone* in the following words: "As to eleemosynary corporations, by the dotation, the founder and his heirs are, of common right, the legal visitors, to see that such

property is rightly employed, as might otherwise have descended to the visitor himself: but, if the founder has appointed and assigned any other person to be visitor, then his assignee so appointed, is invested with all the founder's power, in exclusion of his heir. Eleemosynary corporations are, chiefly, hospitals or colleges in the universities. These were, all of them, considered, by the popish clergy, as of mere ecclesiastical jurisdiction: however, the law of the land judged otherwise; and, with regard to hospitals, it has long been held that if the hospital be spiritual, the Bishop shall visit; but if lay, the patron. This right of lay patrons was indeed abridged by statute 2 Hen. V. c. 1, which ordained that the ordinary should visit all hospitals founded by subjects; though the King's right was reserved, to visit, by his Commissioners, such as were of Royal foundation. But the subject's right was in part restored by statute 14 Eliz. c. 5, which directs the Bishop to visit such hospitals only, where no visitor is appointed by the founders thereof: and all the hospitals founded by virtue of the statute 39 Eliz. c. 5, are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the Bishop of the diocese must visit" (*a*). *Sutton's Hospital case* (*b*): and Lord C. J. *Holt's* judgment in *Philips* v. *Bury* (*c*): that, by *Stokke's* statutes, the Dean of *Stamford* and the Vicar of *All Hallowes*, (who were spiritual persons, and were, themselves, subject to the jurisdiction of the Bishop of *Lincoln*,) were interposed between the Bishop; but for certain purposes only: that, by the charter of *James*, the hospital was incorporated, *de novo*, by the name of the Warden, Confrater and Poor persons of the hospital, which was a variance from the original name of incorpora-

(*a*) 1 Comment. 482. (*b*) 10 Co. 31 *a*.
(*c*) 2 T. R. 346, see 352, 353.

1849.

THE ATT.-GENERAL v. BROWNE'S HOSPITAL.

tion, and his Majesty thereby ratified and confirmed all *Stokke's* statutes, so far as they were not contrary or repugnant to the laws or statutes of the kingdom; and granted that the Bishop of *Lincoln* for the time being, with the advice and assistance of the Archbishop of *Canterbury* for the time being, should, from time to time, revise the ancient statutes of the hospital, and annul such of them as were repugnant to the laws and statutes of the kingdom, and make others, as well concerning the divine service to be daily performed in the hospital, as concerning *the government and direction of the Warden, Confrater and Poor to be supported in the hospital*, who were the whole corporation: that those words gave very large powers, and, according to *The Att.-Gen.* v. *Talbot* (*d*), *The Att.-Gen.* v. *Middleton* (*e*), and *St. John's College* v. *Todington* (*f*), conferred, upon the Bishop, a general visitatorial power over the hospital and the possessions and revenues of it; and that usage was in support of that construction, for, almost ever since the charter was granted, the Bishops of *Lincoln* had acted as general visitors of the charity; *Martin* v. *The Archbishop of Canterbury* (*g*). They concluded by contending that the Bishop of *Lincoln* alone had jurisdiction in this case, and therefore, that the information ought to be dismissed; *The Attorney-General* v. *Dulwich College* (*h*), *The Attorney-General* v. *Magdalen College* (*i*), *The Attorney-General* v. *Smithies* (*j*), *The Attorney-General* v. *Lord Clarendon* (*k*).

(*d*) 3 Atk. 662, see 673.

(*e*) 2 Ves. sen. 327, see 328.

(*f*) 1 Burr. 158, see 200, 201.

(*g*) 1 Sir W. Black. 76, cited.

(*h*) 4 Beav. 255.

(*i*) 10 Beav. 402.

(*j*) 1 Keen, 289.

(*k*) 17 Ves. 491.

Mr. *Rolt*, in reply, referred to *Ex parte The Berkhampstead Free School* (*l*), *The Att.-Gen.* v. *Smithies*, *The Att.-Gen.* v. *Magdalen College*, *The Att.-Gen.* v. *Lord Clarendon*, and *Eden* v. *Foster* (*m*), as authorities that the Court would exercise jurisdiction over the revenues of a charity of which a visitor was appointed, although it would not interfere with respect to the internal management of such a charity: he added that the jurisdiction given, to the Bishop of *Lincoln*, by the charter of *James* the First, was expressly limited to the making of ordinances concerning the Divine service to be celebrated in the hospital and the personal government and direction of the Warden, Confrater and poor of the hospital, and that, thereby the Bishop was excluded from having any jurisdiction over the revenues of the charity: *Ex parte Kirkby Ravensworth Hospital* (*n*).

The VICE-CHANCELLOR:

In this case the question is whether it can be made out, from the charter of *James* the First, that the Bishop of *Lincoln* has been appointed to be the general visitor of the charity. In order to determine that question I thought it necessary to read the whole of the charter through. The Bishop of *Lincoln* has put in an answer in which he submits the question to the Court.

It certainly appears that acts have been done, by his Lordship and by some of his predecessors, which assume that they were general visitors: but, on looking over the charter, which I have read from beginning to end, my opinion is that that is not the case.

(*l*) 2 Ves. & Beam. 134. (*m*) 2 P. W. 325.
(*n*) 15 Ves. 305.

1849.

THE ATT.-GENERAL v. BROWNE'S HOSPITAL.

In the case of the *Berkhampstead* Free School, I observe that Lord *Eldon*, speaking of a decretal order which had been made in the year 1744, declaring that the warden of *All Souls* was visitor of the school, but that the revenues were subject to the jurisdiction of this Court, takes occasion to express his approbation of that decree. It is perfectly plain, therefore, that there may be a limited visitatorial right in a person, who, in that respect, may be called the visitor, without the right extending to the management of the general revenues. His Lordship states it to have been decided by the Court, and to be quite clear that, where there is a local visitor as to the conduct and management of a school, if, in the original instrument, a trust is expressed as to the application of the revenue, this Court has jurisdiction to compel a due application.

Now, by this charter of *James* the First, the only words which bear at all on the question, are those which give a power to abrogate ancient statutes and to make new ones. And it appears to me that the words: "as well concerning the Divine service to be celebrated in the hospital, as concerning the government and direction of the Warden, Confrater, and Poor to be supported in the hospital," must, necessarily, be taken as applying as well to the statutes which the Bishop has power to abrogate, as to the statutes which he has power to make *de novo*: otherwise there would be this grievous inconvenience; that he would have power to abrogate all the existing statutes, and would only have power to make some new ones. Therefore my opinion is that the words, "as well concerning," must be taken to be as restrictive of the power to abrogate, as they are of the power to substitute. And then we find that there is no direction as

to the general management of the lands and tenements of the charity; but that only a power to visit the Warden, Confrater and Poor of the hospital, is given.

1849.
THE ATT.-GENERAL v. BROWNE'S HOSPITAL.

My opinion is that the Bishop of *Lincoln* has not the general power over the revenues of the charity; but, the revenues having increased, the jurisdiction as to the application of them, is with this Court.

MAUDSLAY AND FIELD'S CASE.*

IN THE MATTER OF THE WINDING UP OF THE INDIA AND AUSTRALIA MAIL STEAM-PACKET COMPANY.

1850: 7th, 9th, and 14th Nov.

Joint-stock companies winding-up Acts. Contributory.

THIS was an application, under the Winding-up Acts, to strike out the names of Messrs. *Maudslay* and *Field*, from the list of contributories as settled by the *Master*.

A. agreed to take shares in a company and paid the deposits on them; but did not act as a member of the company. The object for which the company was formed, became impracticable, and an order was made for winding up the affairs of the company. The *Master* inserted *A.'s* name in the list of contributories; but the Court ordered it to be struck out.

The promoters of the undertaking obtained a royal charter, dated the 7th of August 1847, incorporating the company. But, by the express provisions of the charter, the company was prohibited from commencing business, until one fourth of the capital should have been subscribed for, and one eighth actually paid up. The capital was to be 1,000,000*l.*, divided into 50,000 shares of 20*l.* each. Therefore, before the concern could come

* This and the next case, were decided by *Vice-Chancellor Rolfe*; but, on account of their importance, they are reported in the present series of Mr. *Simons's* Reports. That series will terminate and a new one will be commenced, when the remaining cases decided by the late *Vice-Chancellor of England*, are reported.

1850.

MAUDSLAY AND FIELD'S CASE.

into operation, it was necessary that 250,000*l.* should have been subscribed for, and 125,000*l.* should have been actually paid up. These conditions were never complied with, and, therefore, the company never came into existence as a working concern. The project having failed, the usual order was made, on the 4th of May 1849, for winding up the affairs of the company; and, in settling the list of contributories, the *Master* inserted in it the names of Messrs. *Maudslay* and *Field*, on the ground that they had agreed to take 1000 shares in the chartered company, and paid the required deposit of *5s.* per share.

Mr. *Bethell* and Mr. *Daniel* supported the application.

Mr. *Rolt* and Mr. *Hetherington* opposed it. They cited *Upfill's* case as being precisely in point (*a*); and referred also to *Ex parte Barber* (*b*), *Ex parte Mathew* (*c*), *Lord Mansfield's case* (*d*), and *Parbury's case* (*e*).

The VICE-CHANCELLOR, after stating the facts of the case, delivered the following judgment:*

Now it is to be observed that, in this as, indeed, in a large proportion of the cases, the concerns wound up,

(*a*) Decided in the House of Lords on the 7th August, 1850. A transcript of the short-hand writer's notes of the judgment, (which was moved by Lord Brougham,) with his Lordship's corrections, was produced. See also 14 Jurist, 843.

(*b*) 1 Hall & Twells. 238; and 1 Macn. & Gord. 176.

(*c*) 14 Jurist, 928.

(*d*) 2 Macn. & Gord. 57.

(*e*) 3 De Gex & Smale 43.

* His Honour kindly furnished the Reporter with a note of his judgment.

though described as the concerns of the company, are, in truth, not the concerns of the company, but the concerns of the body of promoters, who have incurred expenses in endeavouring, unsuccessfully, to form a company. It would be idle pedantry even to advert to this distinction so long as it is merely an inaccurate expression. But it is very necessary to keep it carefully in view, when we are considering by whom the liabilities of the concern are to be borne. For it by no means follows that the same persons who would have been bound to bear the losses of the projected concern if it had been formed, are also liable to pay or contribute to the costs incurred in the abortive attempts to form it.

The question I have to decide in determining whether a party is to be treated as a contributory to the expenses incurred in endeavouring to form a company, must be, whether such party authorized the persons by whom they were incurred, to incur them on his account. If he did, then he is liable to contribute; if he did not, then he is not liable. It has, indeed, sometimes been said that, though this may be the test of legal, it is not, necessarily, the test of equitable liability. To this I must remark that I have never known, in any of these cases, an equitable as distinguished from a legal liability. I will not, however, say that such a case may not exist. Should it occur, it must be dealt with on its own grounds. Suffice it to say that, in the case now before me, and, in all similar cases where parties are sought to be made liable to the preliminary expenses by reason of their dealings with the promoters of the scheme, the liability, if it exists, is certainly legal and not equitable.

Now, applying these principles to the case of Messrs. *Maudslay* and *Field*, we must inquire whether they

1850.

MAUDSLAY AND FIELD'S CASE.

gave authority to Mr. *Yates** and the other persons active in trying to form the company, to incur expenses on their account: if they did so, it could only have been by their applying for and agreeing to take shares and paying the deposit, thereon, of *5s.* per share. But how did this give any such authority? Taking or agreeing to take shares in a projected company, when translated into legal language, means only agreeing to become a partner in the concern which is about to be formed. A man may well agree to this, if, having considered the nature of the scheme and the capital to be raised, he is satisfied that, with the proposed funds and number of contributors, the speculation is likely to be profitable. Whether the promoters will be able to get the requisite capital or the necessary body of subscribers, or what may be the cost of doing so, is a matter as to which he has no means of judging, and, with which, his contract to become a member of the company when formed, has no necessary connection.

It is, indeed, often made a matter of stipulation in these cases, that the expense of forming the company—the preliminary expenses as they are called—shall be a first charge on the funds of the concern when formed. But that does not vary the case. A person taking shares with such a stipulation, agrees, indeed, that, when the condition of forming the company has been performed, its funds, to which he has agreed to contribute, shall be liable to the preliminary expenses. But, still, the formation of the company is a condition precedent; and, until that has been performed, he is liable to nothing: I say to nothing; but that, perhaps, requires to be qualified; for it is often made a term, express or

* The secretary to the company.

1850.

MAUDSLAY AND FIELD'S CASE.

implied, that the small, original deposit made on applying for shares, shall be applicable to the preliminary expenses; and, where that is the case, and the money has been so applied, the sum so deposited cannot, of course, be recovered back by the depositor, even though no company should be eventually formed. But this depends on special contract, and, certainly, does not make the depositor further liable.

Now, applying these principles to the case before me, I am clearly of opinion that the names of *Maudslay* and *Field* have been improperly placed on the list. I assume that they applied for and conclusively agreed to take 1000 shares in this concern: but, for the reasons I have already stated, I do not think this involved them in any part of the expenses incurred in the endeavour to form the company, or gave any authority, to the promoters, to incur expenses on their account. Whether they may have precluded themselves from recovering back the *5s.* per share deposit, is a matter on which it is not necessary that I should give an opinion.

The right of these parties to be removed from the list of contributories, appeared to me, at the time of the argument, so clear, that I should not have reserved my judgment, had it not been urged, at the Bar, that the decision of the House of Lords, at the close of the last session, in *Upfill's case*, was a decisive authority for retaining the names. I was anxious, therefore, to look into that case; and I have since done so; and I find it clearly distinguishable from the present. There *Upfill* was a provisional committee-man; and, in that character, he accepted shares. Lord *Brougham* expressly stated, in giving his judgment, that he decided that case, not on the ground that *Upfill* was a

1850.

MAUDSLAY AND FIELD'S CASE.

provisional committee-man, nor on the ground that he had accepted shares, but on those two facts taken in union with each other. I presume the principle of that decision is that, when a provisional committee-man accepts shares in that character, he must thereby be taken to have given authority, to the other members of the committee, to incur expenses on his account in forming the company. I confess I have great difficulty in understanding the principle: but, of course, I bow to the authority, and shall be guided by it in cases where the facts are similar. Here, however, there is a clear distinction; for *Maudslay* and *Field* were not provisional committee-men, and took no part in the forming of the company, except so far as they may be considered to have done so by agreeing to take shares. So that one of the ingredients held by Lord *Brougham*, in *Upfill's case*, to be essential in order to create liability, is wanting.

I have decided this case on general grounds which make it unnecessary for me to inquire how far Mr. *Bethell* is right in his argument that, in fact, there never was any acceptance of shares at all; or, if there was, then that such acceptance was afterwards abandoned by consent.

The names of Messrs. *Maudslay* and *Field* must be removed from the list, and the costs of all parties will come out of the funds.

CARMICHAEL'S CASE.

1850: 11th and 14th November.

Joint-stock Companies Winding-up Acts. Contributory.

On the 1st of August *A.* wrote a letter to the provisional committee of a company, requesting them to allot him one hundred shares in it, and adding that he agreed to accept such shares as might be allotted to him. On the 11th of the same month he wrote a letter, to the solicitors to the company, consenting to be a provisional committee-man, and added that, if the solicitors would send him a printed form of application, he would fill it up with fifty or more. On the 11th of October following, he gave his formal consent, in writing, to become a provisional committee-man, and to take one or more share or shares. One of the books of the company contained an entry of one hundred shares having been allotted to him; and another contained an entry of his being an applicant for fifty shares. On the 17th of October the secretary to the company informed him that one hundred shares had been allotted to him, and requested to be informed how many of them he intended to take. Held that he had never bound himself to take any shares at all; and, therefore, that the *Master* had erred in placing his name on the list of contributories.

IN THE MATTER OF THE WINDING-UP OF THE IRISH WEST-COAST RAILWAY COMPANY.

'N the 1st of August 1845, Mr. *Carmichael* wrote a ter to the provisional committee of the Company, uesting them to allot him 100 shares in the Company, l adding that he *agreed to accept such shares as might be ɔtted to him*, and to pay the deposits on them, and also to n the parliamentary contract and the subscribers' agreent when required. On the 11th of August 1845, he ɔte a letter to Messrs. *Reed* and *Robinson*, the then citors of the Company, in the following words: "Your our of the 31st of July, was duly received in my ence; therefore, I could not reply till to-day. With ard to the *Irish West Coast Railway*, I am of opinion t it will be a good line; and have no objection that name should be used as one of the provisional comtee; and, if you will send me the printed form of lication, I will fill it up, taking fifty* or more." On 11th of October 1845, Mr. *Carmichael* signed and t to the solicitors of the Company, a formal consent be one of the provisional committee, and an agreent to take one or more share or shares in the pro-

* *Sic.*

1850.

CARMICHAEL'S CASE.

posed undertaking, on the same being allotted to him. One of the books of the Company contained an entry of 100 shares having been allotted to Mr. *Carmichael*; and another contained an entry of an application, by him, for fifty shares; but there was no date to either of those entries. On the 17th of October 1845, the secretary to the Company, wrote a letter, to Mr. *Carmichael*, stating that 100 shares had been allotted to him, and requesting to be informed *how many of them he intended to take*. On this evidence, the *Master* included *Carmichael's* name in the list of contributories to the Company, as a provisional committee-man and an allottee of 100 shares therein.

Mr. *Rolt* and Mr. *Surrage*, for *Carmichael*, now moved that the *Master's* decision might be reversed, and that *Carmichael's* name might be excluded from the list of contributories. They said that *Carmichael*, though he was a provisional committee-man, had never accepted any shares in the company; and, therefore, according to *Upfill's case* (*a*), his name ought not to have been included in the list of contributories.

Mr. *Bethell* and Mr. *Bell*, for the Official Manager of the Company, said that the Court, unless it disregarded *Upfill's case*, could not come to any other conclusion than that *Carmichael's* name had been rightly placed on the list of contributories: for he had offered to take 100 shares in the Company, and the Company had accepted his offer and allotted him that number of shares; and, that, as soon as they entered the allotment in their books, he was bound by his offer; and that he had never attempted to retract it; but had acted consistently with it throughout; for, in his letter of the 11th

(*a*) Cited from the transcript of a short-hand writer's notes, which had been revised by Lord *Brougham*.

of August, he had consented to take fifty shares *or more*; and, in the document which he signed as a provisional committee-man, he had consented to take one *or more* share or shares; both of which acts were quite consistent with his original offer.

The VICE-CHANCELLOR:

In this case the evidence on which the *Master* has placed the name of Mr. *Carmichael* on the list of contributories is as follows:—First, there was a letter of application from Mr. *Carmichael* to the provisional committee, dated the 1st of August 1845, in which he requests them to allot to him 100 shares. It was not shown that anything was done in consequence of that application. Secondly, a letter from *Carmichael* to Messrs. *Reed* and *Robinson* of the 11th of August 1845, in which he expresses his approbation of the proposed line, and consents that his name should be put on the provisional committee; and he adds, "If you will send me the printed form of application, I will fill it up, taking fifty or more."

Who Messrs. *Reed* and *Robinson* were, does not appear; but I assume they were persons acting for the promoters of the scheme. There is no evidence of anything further having been done until the 11th of October, on which day *Carmichael* signed and remitted to *London* a proper consent to have his name placed in the books at the Stamp Office as a provisional committee-man. On the 17th of October, the secretary of the Society wrote to *Carmichael*, informing him that the committee of management had placed at his disposal 100 shares, and desiring him to send in an application for the number he should wish to take up. This is all the evidence; except that the Company, in one of their books, entered the name of Mr. *Carmichael* as an appli-

1850.

CARMICHAEL'S CASE.

cant for fifty shares, and in another, entered 100 shares as having been allotted to him. But this was, of course, all done behind his back, and cannot affect him.

Now I think it clear, on this state of facts, that neither the promoters of the scheme on the one hand, nor Mr. *Carmichael* on the other, considered that any definite agreement had been come to for taking shares at all. Mr. *Carmichael* originally applied for 100 shares; but it does not appear that anything was done on that application; and, ten days afterwards, he writes again, intimating his desire to take fifty or more; which is inconsistent with the notion that he was, at that time, an applicant for 100. All such applications are made on an implied condition that they shall be answered promptly, or, otherwise, that the party applying shall not be bound by his application. And that this was so understood by the Company, is apparent from the tenor of the secretary's letter of the 17th of October; in which, though he informs Mr. *Carmichael* that 100 shares had been allotted to him, yet he couples that information with an inquiry how many he intends to take. I am of opinion that, on this evidence, there is nothing to show that Mr. *Carmichael* had ever bound himself to take any shares at all.

This, therefore, clearly distinguishes the present from *Upfill's case*. *Upfill* had, clearly and in terms, accepted his shares; and the judgment of Lord *Brougham* proceeds mainly on that circumstance. *Carmichael*, therefore, is merely a provisional committee-man, not having accepted shares, nor, in any manner, authorized expenditure on his behalf. His case, therefore, is undistinguishable, in principle, from *Cottle's case* (*a*): and so the *Master* was wrong in placing his name on the list. It must therefore be removed.

(*a*) 2 Macnaght. & Gord. 185.

CLEMENTS *v.* BOWES.

1852:
14th January.

Company.
Parties.
Demurrer.

Bill by a shareholder in a Company, on behalf of himself, and all others except the Defendants, who were members of the finance committee, praying an account of the receipts and payments of the Defendants on behalf of the Company, and payment of what should be found due to the Plaintiff; the bill stated that an account had been delivered to the Plaintiff, and it alleged that the finance committee had exclusive control over the money affairs of the Company.

Held on demurrer that the Plaintiff was not bound to proceed under the Winding-up Act, and that neither the directors nor any other shareholder need be parties on the record.

THE bill was by one of the share or scripholders of a certain Joint-stock Company or projected Company, called the *Hull* and *Lincoln* Railway Company, on behalf of himself and all other shareholders in the said Company other than and except the Defendants. It stated that in the year 1845 a subscription was commenced by several persons, with a view of forming a Company for making &c. a railway from the town of *Hull* to the city of *Lincoln*, to be called the *Hull* and *Lincoln* Direct Railway Company, and which projected railway or scheme was duly registered, &c. That the printed prospectus of the said projected Company was headed "*Hull* and *Lincoln* Direct Railway, registered provisionally, capital 500,000*l.*, in 25,000 shares of 20*l.* each, deposit 2*l.* 2*s.* per share." It stated the application of the Plaintiff for 500 shares and payment of his deposit; that he afterwards purchased 115 shares. It then stated that in the then current parliamentary session an Act was applied for by or on behalf of the said projected Company, and the sum of 26,250*l.* was, on the 4th day of February 1846, deposited with the Accountant-General in conformity with the Standing Orders of the House of Commons, and leave was given to bring in a bill for incorporating the said Company; but such bill was thrown out in the House of Commons, and the projected scheme thereupon fell to the ground. That *John Bowes*, *Henry Smith Bright*, *John Hall*, *John Eggington*, and

1852.

CLEMENTS v. BOWES.

William Goodlad Todd, were appointed the finance committee of the said proposed Company, and all deposits which were made in respect of shares were placed under the exclusive control and at the disposal of the said Defendants, who accepted and acted in the control and disposition thereof; and they the said Defendants were authorized and empowered to make out and settle and adjust the accounts thereof, they being answerable and accountable to the shareholders of the said Company. And it alleged that the Defendants became and were liable and accountable to all the shareholders for all receipts and payments made to or by or in the name of the said Company. It then stated the Plaintiff's application to the Defendant *Todd* for a return of his deposits, and the answer of *Todd*, explaining that the whole deposits could not then be returned, and inclosing a copy of an advertisement offering a return of 17*s.* 6*d.* per share in respect of the balance of deposits received, and a printed form of a letter of application for payment of such amount. That, not being satisfied with such communications, he did not sign or adopt the said last-mentioned letter, and he declined to transmit his scrip certificates to the solicitors of the said Company, or to accept the proposed payment of 17*s.* 6*d.* per share. That, having afterwards reason to believe that a larger amount ought to have been returned, Plaintiff required a proper statement and account of the amounts received and paid on account of the said Company; and such account not having been delivered, Plaintiff's solicitor, Mr. *William Lane*, after some correspondence with the said *William Goodlad Todd*, received from Mr. *J. G. Collins*, who was then acting as a secretary on account of the said Company, a letter, which was in the following words and figures (that is to say):—

1852.

CLEMENTS v. BOWES.

"*Hull* and Direct *Lincoln* Railway Office.

"160, *High-street*, *Hull*, 31st Oct. 1846.

"Sir,—I am desired by the committee of the above-named Railway Company to inclose you a statement of the receipts and expenditure, as requested by you, on account of *B. Clements*, Esq., in your letter to Mr. *W. G. Todd*. You will observe that nearly 1000*l.* deduction has been obtained in settling the bills of the engineers and surveyors. The committee hope to obtain a considerable reduction from the solicitors' bills, and this measure has their earnest attention.

"I am, Sir, your obedient servant,

"*J. G. Collins.*

"*W. Lane*, Esq., 4, *Bedford-place*, *Russell-square*."

That the letter inclosed a statement purporting to be an account of the accounts and expenditure of the projected Company. (The result of such account was a statement of receipts by deposits, &c., of 26,919*l.* 10*s.*, of expenditure of 18,059*l.* 10*s.* 10*d.*, including therein a sum of 10,303*l.* 2*s.* 6*d.*, being the return of 17*s.* 6*d.* per share on 11,775 shares; monies yet due amounting to 7023*l.* 6*s.* 2*d.*, 848*l.* 15*s.* reserved for payment of 17*s.* 6*d.* per share on 970 shares outstanding, and 978*l.* 18*s.* for a further return of 1*s.* 6*d.* per share.)

The bill then stated the bringing of an unsuccessful action against *Todd* for the return of the Plaintiff's deposit. It then stated the application for, and the rendering a further account, which it was alleged was erroneous, and it stated an application for the return of the Plaintiff's deposit, and the refusal of the Defendants *John Bowes*, *Henry Smith Bright*, *John Hall*, *John Egginton*, and *William Goodlad Todd*, to make such return.

1852.

CLEMENTS v. BOWES.

It then stated the circumstances attending a mortgage of some of the Plaintiff's shares to certain persons, and that the Defendants paid to the mortgagees, without the Plaintiff's consent, 17*s.* 6*d.* per share, and the delivery to the Defendants, by the mortgagees, of the shares so pledged.

The Plaintiff charged that the Defendants were liable to him on the mortgaged shares for the difference between the 17*s.* 6*d.* per share and what would be found due to him in taking an account upon the shares. It then stated the deposit of 115 of the Plaintiff's shares with the Defendant *Todd's* solicitor in respect of costs of the Plaintiff's unsuccessful action, and the payment to such solicitor of 17*s.* 6*d.* per share on them, and that the Plaintiff never consented to take 17*s.* 6*d.* per share on these or on his other shares. The bill charged that the Defendants had repaid themselves *in full* in respect of the deposits on some of their shares.

It contained the usual charge in such bills of the number of the shareholders and the impossibility of making them all parties, and that all the persons not parties as Defendants had a common interest with the Plaintiff in having the property of the Company got in and secured, &c.

The prayer was for an account of monies received &c. by the Defendants in respect of deposits paid on shares applied for or agreed to be taken, and an account of the capital of the Company, of the payments, costs, and expenses of the Defendants in the management of the affairs of the Company, and of the clear residue after such account, and that the amount due to the Plaintiff and the other shareholders on behalf of whom he sued,

after giving credits for the accounts received by them (including the sum of 398*l.* 2*s.* 6*d.*, the costs of the Defendant *Todd*), for which he was willing to give credit, might be paid to the Plaintiff and the said other shareholders.

Mr. *Malins* and Mr. *Miller*, for the demurrer.

They argued that this was a case for proceeding under the Winding-up Acts, and not in equity; and that if the bill would lie at all, all the shareholders, and at any rate the directors, ought to be made parties.

They cited *Parbury* v. *Chadwick* (*a*), *Deeks* v. *Stanhope* (*b*), *Hichens* v. *Congreve* (*c*), *Mare* v. *Malachy* (*d*), *Lund* v. *Blanshard* (*e*), *Richardson* v. *Hastings* (*f*), *Lovell* v. *Andrew* (*g*).

Mr. *Willcock* and Mr. *E. G. White* were for the bill.

The VICE-CHANCELLOR KINDERSLEY:

I think that this demurrer must be overruled. The demurrer is for want of equity generally, and also for want of parties. The bill is filed by *Benjamin Clements*, on behalf of himself and all the shareholders other than and except the Defendants, and the Defendants are certain shareholders in the Company who appear to have been appointed a finance committee. The bill states the projection of the Company, and states the various circumstances antecedent to an application to Parliament, and then it states that an Act was applied for on behalf of the projected Company, and a sum of 26,250*l.* was

(*a*) 12 Beav. 614.
(*b*) 14 Sim. 57.
(*c*) 4 Russ. 562.
(*d*) 1 Myl. & Cr. 559.
(*e*) 4 Hare, 9.
(*f*) 7 Beav. 301.
(*g*) 15 Sim. 581.

1852.

CLEMENTS v. BOWES.

deposited with the Accountant-General, in conformity with the Standing Orders, and that leave was given to bring in the bill; that the bill was afterwards thrown out in the House of Commons, and the scheme fell to the ground. Then it states that the Defendants were appointed the finance committee of the proposed Company, and all the deposits which were made in respect of shares were placed under the exclusive control and at the disposal of the Defendants, who accepted and acted in the control and disposition thereof; and they were authorized and empowered to make out and settle and adjust the accounts thereof, they being answerable and accountable to the shareholders of the said Company; "and the said Defendants became and are now liable and accountable to all the shareholders for all receipts and payments made to, or by, or in the name of the said Company;" that is a distinct allegation that all the deposits of the shareholders were placed under the exclusive control of the Defendants. Then the bill states the Plaintiff's demand for a return of his whole deposit, and a correspondence is set out, in which the Defendants offer to return the sum of 17*s.* 6*d.* per share; and it states that an account was rendered to him to show in what way the finance committee had dealt with the money placed in their hands. It also states that an action was brought by the Plaintiff against the Defendant *W. G. Todd;* and it contains various other charges, and prays, not a dissolution and winding up of a partnership and that the accounts might be taken, but it prays that an account may be taken, by and under the direction of the Court, of all monies which may have been received by, or come under the control or disposition of the Defendants, or any or either of them, in respect of deposits paid upon shares applied for or agreed to be taken in the said projected Company, and an

1852.

CLEMENTS v. BOWES.

account of the capital of the said Company; and also an account of the payments, costs, and expenses properly made and incurred or sustained by the Defendants in the management of the affairs of the said projected Company, and of the residue or surplus remaining, after allowing such payments, costs, charges, and expenses, and that such balance or surplus may be apportioned to the shares in respect of which the deposits were so paid; and that the amount due to the Plaintiff and all other the shareholders on behalf of whom he sues respectively, after giving credit for the amounts already received by them respectively (including the sum of 398*l.* 2*s.* 6*d.*, for which the Plaintiff consents to give credit), may be paid to the Plaintiff and such other shareholders as aforesaid by the Defendants; and that for the purposes aforesaid, all proper accounts may be taken, and all proper directions may be given; and that the other shareholders in whose behalf the Plaintiff sues may be ascertained. Now, the bill merely asks that the Defendants, who are allowed to have received all the deposits in respect of the shares, may account for what they have received; and that, after applying such monies in satisfaction of all payments, costs, and expenses, the surplus may be divided, not among any given class of the shareholders, but generally amongst them all, including not only those who have received the 17*s.* 6*d.* but the rest also. The Plaintiff states that, in respect of 115 of his shares, the 17*s.* 6*d.* had been received, but, as to the other shares, he had refused to receive the money. The demurrer is supported on these grounds: first, that a sufficient account had been already rendered; and then that the Plaintiff ought not to be allowed to sue the Defendants solely in respect of that matter. Now, whether the account was satisfactory or not, the rendering of the account could not prevent a person

1852.

CLEMENTS v. BOWES.

from filing a bill to have an account taken under the authority of the Court. It is not sufficient that an account should be rendered upon the representation of the Defendants, but the Plaintiff has a right to have an account taken under the machinery which this Court provides; therefore rendering an account is not sufficient. The second ground of demurrer is that the Plaintiff ought to proceed under the Winding-up Act, and that the legislature having provided the method of winding up and dealing with the affairs of an inchoate Railway Company of this kind, as well as others, this Court ought to refuse to a party the right of coming here to have the account taken. The case of *Parbury* v. *Chadwick* was cited, in which the late *Master* of the *Rolls* stayed proceedings in a suit, on motion, where a bill had been filed after an order made for winding up a Company, and where, if I apprehend rightly the nature of the suit, it sought relief of the same nature as that provided by the Winding-up Act: at all events the bill in that case was filed after the order for winding up had been obtained. Without stating whether, if there had been an existing order to wind up, and then this bill had been filed, I should have considered that a sufficient ground for allowing the demurrer, it appears to me that it cannot be a good ground of demurrer to say you shall not have your remedy by bill, because you may apply for a winding-up order; and it may be the Court will grant it. I am far from taking it for granted that the Court would in this case make such an order. I am not satisfied about that, though I do not say it would not grant it. I express no opinion upon that, but from my experience in these matters, I have been led to this conclusion, that great as is the difficulty in proceeding under a suit for this sort of purpose, the mischief of applying the Winding up Act to such a case is greater. But the real question is,

1852.

CLEMENTS v. BOWES.

whether the Legislature in providing a remedy under this Act has excluded the remedy under a bill for making certain individuals, who have received money in respect of a number of shares, account for the money after allowing for all costs, charges, and expenses, and for distributing such surplus amongst all the shareholders pro ratâ, according to the number of their shares. To oust the jurisdiction of the Court of Chancery in such a case the Legislature should have so declared it. It is plain, where the Court of equity has jurisdiction in such a case, an Act giving further relief does not by that oust the title of the Court of equity, without express terms being used to put an end to the jurisdiction which is inherent in the Court. It appears to me, therefore, that this second ground of demurrer is not sustainable. As to the want of parties the demurrer itself represents two difficulties as existing on the bill with respect to parties, and is framed in this way: "And for further cause of demurrer the Defendants shew that it appears, by the Plaintiff's own shewing, that the scrip or shareholders in the bill mentioned who had not received the sum of 17*s.* 6*d.* per share on their respective shares or scrip in the said bill mentioned, and also the several share or scripholders of the said projected Company, and the persons who entered into a subscription for the purpose of forming the said Company, other than these Defendants, are necessary parties to the said bill; and yet the Plaintiff hath not made such several persons, or any or either of them, parties to the bill." Now the persons here represented as necessary parties are, first, those shareholders who had not received back the 17*s.* 6*d.* per share, the Plaintiff being one who has not received back that sum in respect of some of his shares, though he did with respect to others which he had pledged; and, secondly, those who had received back that sum. The demurrer was, in fact,

1852.

CLEMENTS v. BOWES.

intended to include all the shareholders. As to those who did not receive that sum, the question comes to this, because the principle is clear; the question is, whether that class of shareholders who did not receive the money have a different interest from those who did receive back the amount, that is, the same interest in the relief asked by the bill. Now the relief is for the common interest of all, if for any. I am far from thinking the bill is for the interest of these parties; but if the Plaintiff chooses to enter into such a speculation as the filing of this bill he has a right to do so. The relief asked is, to make five individuals, who are alleged to have received all the monies paid by way of deposit, account for what they have received, and that whatever balance is found to be in their possession, after payment of the proper expenses, may be divided, not amongst any class, but amongst all pro ratâ, that is, the 17*s.* 6*d.* to those who have not received it, and then dividing the rest amongst them all. I cannot see that there is any difference of interest between the one class or the other, as far as the relief sought by the bill, which is the real question. If a person files a bill for himself and others, there may be some who would not like the bill to be filed; but if, on the face of the transaction, it be for the common interest of all, it is no more for the interest of one than the other. It is clearly for the interest of all that the relief here asked should be granted; and it appears to me there is no ground for saying any particular class should be represented by the members of that particular class. Then the other class mentioned is, the whole of the shareholders. The answer to that is, the bill states, and it is therefore admitted by the demurrer, that the whole of the shareholders, being upwards of 200, are so numerous that it is impossible to make them all parties; and as to that point in the case, it is clear upon the authori-

ties that the Plaintiff is not obliged to make them all parties. Now these are the classes of shareholders who, on the face of the demurrer itself, are said to be necessary parties; but it is also argued at the bar that there is another class of persons, not suggested by the demurrer, who also ought to be made parties, namely, those who stood in the position of managers, and carried on the affairs of the concern before the finance committee were appointed; but on the face of the bill there is nothing to shew when they were appointed or why they were appointed the finance committee; and, with one single exception, there is no allusion in the bill to any other body of directors. No doubt it may be supposed there were other directors; but the bill being silent as to such other directors, and no mention being made of any other body of directors other than the finance committee, how am I to say that there were other persons acting as directors? The exception I allude to is the expression contained in a letter which was addressed to the Plaintiff, and in which mention is made that the directors would do so and so; but that is not an allegation of the fact that there were other directors; the bill does not allege that there were, but these gentlemen, in writing an answer, say that the directors may do so and so. Can I then say, without any further evidence, and taking the bill, as I must do, to be true, that there was a body of directors different from the finance committee? Might not the writer of that letter have meant the finance committee when he used the term "directors?" No doubt advantage may be taken of this fact in another mode, but I cannot assume that there was a body of directors who ought to have been made parties to the suit. But suppose there were such a body of directors, what interest have they different from the other shareholders in respect of what

1852.

CLEMENTS v. BOWES.

is asked by this bill? If this bill sought to impeach the management of the directors in imputing to them any improper conduct, and to have the whole dealings and transactions of the concern wound up, then it might be necessary to have them parties; but that is not so, and I must assume all that is stated here to be true, whether the truth has been cut out of the bill by the amendments, as suggested by counsel, or not; and, as regards the relief asked here, there is nothing to shew that there is any ground for supposing such directors would have a different interest from the shareholders generally. I have now considered all the different grounds raised in support of the demurrer, and my opinion is, that the demurrer must be overruled. It is unnecessary to say that I do not express any opinion about the amendments to the bill. That is not my concern.

1849: 8th December.

Will. Construction.

IN THE MATTER OF MARY BAYLISS'S TRUST.

Testatrix devised an estate to trustees, in trust for her brother *Benjamin* for life, and directed the trustees to sell it after her brother's decease, and to divide the produce amongst his children who should be living at his decease; and, after giving sums of money and shares of her residue to the children of her other brothers and sisters, she said: "I direct that the legacies and shares of such of my nieces as *are* married, shall be to their separate use, free from the debts and control of *any* husband, and that my trustees *shall have* power to give effect to this my intent." Held that the testatrix had used the word "are" in a future sense, and that she intended that such of her nieces as *should be* married *at the time when their legacies and shares became payable*, should take to their separate use.

MARY, the wife of *John Bayliss*, by her will dated the 21st of May 1835, and made in execution of a power reserved to her by her marriage settlement, disposed of

1849.

In re BAYLISS'S TRUST.

the property subject to the power, in the following words:—

"I direct, limit, and appoint, give, devise, and bequeath unto *T. Harrington* and *W. Horniblow*, all my freehold and copyhold messuages, cottages, lands, and premises, situate in the parishes of *Severn Stoke* and *Campsey*, in the county of *Worcester*, and of *Twyning*, in the county of *Gloucester*, and all other my real estate whatsoever and wheresoever, and also my personal estate and effects over which I have any disposing power, except such part thereof as is hereinafter bequeathed: To hold unto the said *T. Harrington* and *W. Horniblow*, their heirs, executors, administrators, and assigns, according to the several natures and qualities thereof, subject to the estate for life of my husband therein under the said settlement, upon trust, as to the freehold messuage, lands, and premises in *Severn Stoke* aforesaid, now in my occupation, and called the *Pellsmores*, for my brother *Benjamin Barnes* and his assigns, for his life; and, immediately after his decease, I direct my said trustees to sell and dispose thereof, and to pay and divide the produce thereof unto and between all and every the child and children of my said brother *who shall be living at his decease*, share and share alike. And as to all the rest and residue of my said real and personal estate, upon trust that my said trustees do and shall, as soon as conveniently may be after the decease of my said husband, sell and dispose thereof, and collect and convert the whole into money, and do and shall stand possessed thereof in trust, after payment of my just debts and funeral and testamentary expenses, to pay the following legacies within twelve months after my said husband's decease; namely, to my nieces *Elizabeth Craddock*, *M. A. Morris*, and *Mary Barnes*, 200*l.* each; to my nieces

1849.

In re BAYLISS'S TRUST.

A. Fildes and *M. Lloyd*, 100*l.* each; to my nephew *T. White*, 200*l*; to my nephews and nieces *Richard Fisher*, *G. Fisher*, *J. Fisher*, *Mary Fisher*, *John Tremble*, and *Sarah Wiltshire*, 50*l.* each; and to divide the residue into five equal parts: as to one fifth thereof, in trust for my sister *Hannah White*, to receive the interest for her life, and on her decease the principal to go and be paid to her two children, the said *T. White* and *M. A. Morris* equally; as to one other fifth part thereof, the principal to be immediately paid and divided unto and between my two nieces *M. Lloyd* and *M. Haywood*, the daughters of my deceased sister *Ann Haywood*, equally; as to one other fifth part thereof, the principal to be immediately paid and divided unto and between my nephews and nieces the said *J. Tremble*, *A. Fildes*, and *Sarah Wiltshire*, the three children of my deceased sister *Sarah Fisher*, equally; and as to one other fifth part thereof, the principal to be immediately paid and divided unto and between my nephew and nieces *G. Lurcote*, the said *Elizabeth Craddock*, and Mrs. *Peltipher*, the three children of my deceased sister *E. Lurcote*, equally; and as to the remaining fifth part thereof, in trust for my brother *George Barnes*, to receive the interest thereof for his life, and if he die in the lifetime of my sister *Hannah White*, for her to receive the interest thereof for her life, and on the decease of the survivor of them, the principal of the last-mentioned fifth part to be paid and divided unto and between all such of my nephews and nieces as the other four fifths are hereinbefore given and bequeathed unto, and in the same shares and proportions. I direct, as far as I lawfully can, that the legacies and shares of such of my nieces as *are* married, shall be to their own separate use, free from the debts and control of *any* husband, and that my trustees shall have power to give effect to this my intention."

1849.

In re BAYLISS'S TRUST.

The testatrix died, a widow, in April 1843. Her brother, *Benjamin Barnes*, died in July 1847, leaving a son and a daughter, his only children. In August following, *Horniblow*, the surviving trustee of the will, sold the *Pellsmores* estate, and paid one moiety of the purchase-money to the son of *Benjamin Barnes*, and the other into Court, under the Act for the relief of trustees.

The petition, which was presented by the daughter of *B. Barnes* by her next friend, alleged, after stating as above, that at the date of the will *Benjamin Barnes* had two children, and no more, namely, a son and the Petitioner; that six of the testatrix's nine nieces named in her will were married at the date of the will, and the Petitioner and the other two were single; that in July 1836 the Petitioner married *John Hunt*, who died in May 1841, and in August 1844 she married *W. Asbury*, who had since taken the benefit of the Insolvent Debtors Act; and that, according to the true construction of the will, the Petitioner was entitled to the fund in Court, *for her separate use;* and the petition prayed that the fund might be paid to her accordingly.

Mr. *Rolt* and Mr. *Archibald Smith*, in support of the petition, said that the word "are" was frequently used in a future sense; and that the testatrix so used it in the clause at the conclusion of her will; and that she intended that the legacies and shares of such of her nieces as should be married at the time when their legacies and shares became payable should be to their separate use; that, in the same clause, she spoke of *any* husband of her nieces, and directed that her trustees *should have* power to give effect to her intention; and, consequently, that the Petitioner, though she was a spinster at the date of the will, and a widow at the testa-

1849.

In re BAYLISS'S TRUST.

trix's death, was entitled to the fund for her separate use. *Ringrose* v. *Bramham* (*a*); Co. Litt. 20. b.; and *Christopherson* v. *Naylor* (*b*).

Mr. *Smythe*, for the assignees of the Petitioner's husband, referred to 1 *Jarman* on Wills, 279, and contended that the nieces whose legacies and shares were to be to their separate use, were those mentioned in the immediately preceding clause in which the testatrix directed the residue to be divided into five equal shares.

The *Vice-Chancellor*.—The testatrix says, "the legacies and shares." Those words refer to all the legacies and shares which she had before given.

Mr. *Stinton* appeared for *Horniblow*, and Mr. *Leach* for the Petitioner's husband.

Mr. *Rolt* replied.

The *Vice-Chancellor* said that the present tense was very commonly used in a future sense; that the testatrix was disposing of nothing but property in remainder; that it would be odd to say that she meant some of her nieces to take differently from the others—that is, those who were married at the date of her will or at her death, to their separate use, and those who were married afterwards, not to their separate use; that the words, "all and every the child and children of my said brother *B. Barnes* who shall be living at his decease," were prospective and contingent; that the words "any husband of my said nieces," did not refer merely to a husband then living; and that the testatrix, when she

(*a*) 2 Cox, 384. (*b*) 1 Mer. 320.

1849.

In re BAYLISS'S TRUSTS.

said, "my said trustees *shall have* power to give effect to this my intention," was speaking of a future power to be exercised by her trustees, and showed that her nieces whose legacies and shares were to be to their separate use, were those who were married *at the time when they took;* and, therefore, his opinion was that the Petitioner was entitled to the fund in Court for her separate use.

Order the costs of all parties to be taxed, paid out of the fund, and the residue to be paid to the Petitioner, on her separate receipt.

ROBINSON *v.* HEDGE.

1850:
3rd June.

Judgment.
Insolvency.
Priorities.

A debtor having real estate, gave a judgment and warrant of attorney under the 1 & 2 Vict. c. 110. Afterwards he became insolvent; the estate was sold.

Held that the judgment creditor had an equitable interest in the money in priority over the assignees.

THIS was a bill by a judgment creditor under the 1 & 2 Vict. c. 110, claiming the benefit of his judgment against a subsequent insolvency of the debtor. The material facts will be found stated in the arguments and judgment. The circumstances were somewhat complicated; and a question arose, what was the interest of the judgment debtor at the time of the judgment. The principal question however was, assuming him to have real estate transferable, what was the effect of the judgment and subsequent insolvency.

Mr. *Stuart* and Mr. *Martindale*, for the Plaintiff.

By the 13th section of the statute, the judgment is a charge on the land from the time it is entered up. The creditor is not to proceed upon his charge until a year has elapsed. But that does not alter the commencement of the estate. The judgment was in March, 1848, the insolvency was in September, 1848. The sale took

1850.

ROBINSON v. HEDGE.

place in January 1849. The argument on the other side is that the charge is a charge on money.

But that is not so. It is expressly, by the 13th section, a charge on the land. We have under that Act an equitable mortgage from the time of entering up the judgment; what is there in a subsequent conversion of the estate into money to alter our character? How is the position and right of the mortgagee altered by a subsequent insolvency of the mortgagor? Why should it be so any more than in the case of a sale under a common mortgage, where by the terms of the proviso the mortgagee is to stand possessed of the money? It is said the 61st section is against us; but that applies only to execution issued on a warrant of attorney. We do not want and do not ask for any thing that we could have under that section. We wish only to retain our character of mortgagees.

Mr. *Murray*, for the insolvent, took no part in the argument.

Mr. *Bethell* and Mr. *Beale*, for the assignees.

By the 21st section of the Act, the title of the assignees entirely overreaches the title of the judgment creditors: 7 & 8 Vict. c. 90, ss. 21 and 73. The debtor was discharged under this last Act. As to the 13th section of the 1 & 2 Vict. c. 110, the judgment creditor is to have the benefit of the statute only in equity, and then not till twelve months after the judgment; and then it provides that he shall not have any preference in cases of bankruptcy, unless the judgment is entered up. The right of the creditor is to be in abeyance until it is twelve months old; and it is destroyed by any proceedings for the administration of the estate of the judgment debtor.

If, in the meantime, the hereditaments are taken for any purpose of distribution amongst general creditors, the charge falls to the ground. The 7 & 8 Vict. c. 90, repeats, with regard to the subject-matter of the 21st section of the 1 & 2 Vict., the material words of that section. Then the case is stronger with regard to insolvency than to bankruptcy. If the judgment creditor has not issued execution, the judgment falls to the ground. We admit that the judgment is an incumbrance, but it is not so till the end of twelve months; and if in the interval insolvency intervenes, the judgment creditor drops into the common herd of creditors. We rely on the last words of the 13th section. Now here, before the inchoate title of the judgment creditor was matured, the whole estate was taken away and vested in another person, and then the 21st section destroys that judgment.

They referred also to the 5 & 6 Vict. c. 116, and to *Parrott* v. *Congreve* (*a*).

Mr. *Stuart*, in reply.

The fallacy, in the argument, is the assumption that the judgment has no operation till twelve months after its date; in truth it is a *charge* from the time it is entered up, though the charge is not to be enforced till the expiration of twelve months. He referred to *Hotham* v. *Somerville* (*b*). The 7 & 8 Vict. only applies to cases of executions under judgment. The fund in Court, the produce of the sale, ought to be handed over to us.

The *Vice-Chancellor* on a subsequent day said that he had read over all the documents, as was his usual prac-

(*a*) 16 Sim. 579. (*b*) 9 Beav. 63.

1850.

ROBINSON v. HEDGE.

tice, for the purpose of seeing what was the exact machinery used, and he must say that, having regard to all that was to be found in the 1 & 2 Vict., the act for regulating insolvency, and the 7th & 8th of the Queen, his opinion was that the question in the case must be decided entirely on the law of insolvency created under the 1st & 2nd Vict. Nothing whatever in the 7th & 8th Vict., as it appeared to his Honor, overruled the plain construction of the 1st & 2nd; and, although the matter appeared at first rather complicated, it came to this:—a Mr. *Lister* having a remainder in tail which was capable of being barred, executed a conveyance and charge in 1847, on which nothing turned, and another charge in 1848, which created a charge in favour of *Hedge*. Then it appeared by a deed dated in February 1848, *Lister* conveyed the remainder in fee to *Hedge*, so as to give him a legal estate in trust to sell and pay off himself, and the residue to *Lister*, his heirs, appointees, and assigns; and he (the *Vice-Chancellor*) observed in the report, when the case came before him, and which was reported in the "Law Journal," he expressed an opinion that it might be difficult to say whether the charge under the Insolvent Act might not operate as an appointment. His Honor's opinion was that, on the construction of the Act, when once a conveyance had been made to *Hedge*, and a warrant of attorney and entry up of judgment in the Common Pleas, on the 7th of March, in favour of *Robinson*, thereby a redeemable interest, to say the least of it, was created in *Robinson*, and therefore it was now a mere matter of course that he should have what he asked, and that the residue should go to the assignees in insolvency.

SCARISBRICK *v.* SKELMERSDALE.

1849: 18th December. 1850: 18th January.

Will. Accumulation.

THE question in this case arose on the will of *Thomas Eccleston*, which, so far as it is material, was as follows:—

Thomas Eccleston, by his will dated the 14th day of October 1806, devised his *Scarisbrick* estates, his *Halsall* estates, and his *Wrightington* and *Parbold* estates to *Edward Wilbraham Bootle* and *Streynsham Master*, their heirs and assigns, on trust that they should in such manner as they should think fit, or as counsel should advise, convey, settle, and assure the said estates so and in such manner as that the same (so far as the rules of law and equity and the circumstances of the case would admit and as would be consistent with the general purport and meaning of that his will) might go, remain, and be to the uses and upon and for the trusts, intents, and purposes thereinafter expressed and contained. The will was divided into clauses. By the 3rd clause it was declared, that, as to the *Scarisbrick* and *Halsall* estates, they were to go to the use that the testator's wife might receive thereout an annuity of 600*l.*, and subject thereto the said estates should by the intended settlement be settled to the use of *Edward Wilbraham Bootle*

Testator directed a settlement of certain estates to be made, so far as the rules of law and equity would allow, to certain uses—as to part, it was to be settled to the use of trustees for 2000 years, in his *W.* estate, in trust to pay any child of his body, or the issue of such child (who under the limitations of the will should be entitled to the possession of the rents of his *W.* estate, and who, having attained twenty-one, should be under the age of twenty-five), an annual sum of 800*l.*, till he should have attained twenty-one, or die under that age; and to accumulate the surplus, as well during the minority or respective minorities of every person so for the time being entitled, as during such time as any child of his body so being entitled as aforesaid, should be under the age of twenty-five, and at the end of every period of accumulation, to apply the accumulated fund towards payment of his debts. Held that this trust for accumulation was void.

1849.

SCARISBRICK v. SKELMERSDALE.

and *Streynsham Master*, their executors, administrators, and assigns, for the term of 1000 years, upon the trusts thereinafter declared; and after the expiration of the said term to the use of the testator's eldest son *Thomas Eccleston* for life, with remainder to his issue in tail; and for default of such issue to the use of the testator's second son *William Eccleston* and his issue in tail; and for default of such issue to the use of the testator's third son *Charles Eccleston* and every other subsequently-born son of the testator's body successively in the order of his birth during the term of his natural life, without impeachment of waste; and after his respective decease to the use of his respective first and other sons severally and successively and according to their respective seniorities in tail male; and for default of such issue, remainders to the testator's daughters, *Ann Eccleston*, *Mary Eccleston*, *Elizabeth Eccleston*, and *Catherine Eccleston* successively, and their issue in tail, in manner therein mentioned, with remainders over. By the 5th clause the testator declared that the term of 1000 years was for the purpose of better securing the annuity of 600*l.*; and in the next place for securing the payment of such of the testator's funeral expenses, debts, and legacies as his personal estate, and the other funds thereinafter provided, would not satisfy; and in the next place for raising certain annuities; and in the next place, during the space of twenty years to be computed from the day of the testator's decease, to levy and raise out of the rents and profits an annual sum of 1000*l.*, and accumulate the same, and apply the same and the accumulations towards the payment of the funeral expenses, debts, and legacies; and in the next place as an auxiliary security for the payment of certain portions to his issue. By the 6th clause the testator directed his trustees to convey, settle, and assure his *Burscough* estates, and

1849

SCARISBRICK v. SKELMERSDALE.

his *Wrightington* and *Parbold* estates to them, their executors, administrators, and assigns for the term of 2000 years, upon the trusts thereinbefore expressed and contained of and concerning the same, and in the meantime subject thereto, to the use of the testator's second son *William Eccleston* for life, with remainder in tail to the sons of *William Eccleston*, and for default of such issue to the use of the testator's third son *Charles Eccleston*, and every other subsequently-born son of the testator's body successively in the order of his birth, during the term of his natural life, without impeachment of waste, and after his respective decease, to the use of his respective first and other sons successively, and according to their respective seniorities in tail male; and for default of such issue, to the use of the testator's eldest son *Thomas Scarisbrick* for life, with remainder to the sons of *Thomas Scarisbrick* in tail male; and after the decease of each of the testator's said sons, taking in such order as last thereinbefore mentioned, to the use of his first and other sons severally and successively, and according to their respective seniorities, in tail, but so that the respective son or sons of the eldest of such sons, and such their respective issue as aforesaid, should always after his or their respective parents' decease, take before and be preferred to the respective son or sons of the younger of such sons and their respective issue as aforesaid; and for default of such issue, and after the respective decease of each of the testator's said sons, taking in such order as aforesaid, to the use of the daughters of the sons in manner therein mentioned, and for default of such issue to the use of the trustees and their heirs during the respective lives of the testator's second, third, and fourth daughters, *Mary Eccleston*, *Elizabeth Eccleston*, and *Catherine Eccleston*, and every other subsequently born daughter of the testator's body, in trust to apply the rents and profits of

1849.

SCARISBRICK v. SKELMERSDALE.

the said last-mentioned estates to the sole and separate use of the said *Mary Eccleston*, *Elizabeth Eccleston*, and *Catherine Eccleston*, and every other subsequently born daughter of the testator's body, successively in the order of her birth, during the term of her natural life, but so that after the respective decease of each of such daughters, taking in such order as aforesaid, the last-mentioned estates should be and remain to the use of her respective sons and daughters in such order as therein mentioned, and in default of such issue the estates were limited over. In the seventh clause was contained a provision for shifting the *Wrightington* and *Parbold* estates, if *William Eccleston* and *Charles Eccleston*, or *Mary Eccleston*, *Elizabeth Eccleston*, and *Catherine Eccleston* should become entitled to the rents and profits of the *Scarisbrick* and *Halsall* estates. The ninth clause was as follows:—"And in the settlement so to be made as aforesaid, it shall be expressed and declared that the said last-mentioned estates are limited to the said *Edward Wilbraham Bootle* and *Streynsham Master*, their executors, administrators, and assigns, for the said term of 2000 years in the first place, for securing by the usual ways and means money for the payment of such of his funeral expenses, debts, and legacies as his personal estate and the other funds thereinbefore or thereinafter provided for that purpose would not be sufficient to pay and satisfy; and in the next place, as an ulterior or auxiliary security for the payment of the sums of 5000*l.* thereinbefore directed to be raised for his daughters and his fourth and other subsequently born sons out of the estates thereinafter directed to be sold; and in the next place, if no part of the *Eccleston* and *Sutton* estates thereinafter devised should remain after answering the trusts and purposes thereinafter declared of or concerning the same, or if the part which should remain of the

1849.

SCARISBRICK v. SKELMERSDALE.

same should be under the value of 10,000*l.*, (valuing the same at twenty-five years' purchase on the net rents exclusively of the land tax,) then as the case might be in trust by the usual ways and means to raise the sum of 10,000*l.* or such a sum of money as should make the value of the remaining estate equal to the sum of 10,000*l.*, and pay and apply the same to his said son *Charles Eccleston*, his executors, administrators, and assigns; but in case his said son *Charles Eccleston* should die under the age of twenty-one years without leaving lawful issue, then to such subsequently born son of his body as should first attain the age of twenty-one years, or die leaving lawful issue, his executors administrators and assigns, but without interest in the meantime; and, in the next place, in trust to pay to any child of his body, or the issue of such child who, under the limitations of the said settlement, should for the time being be entitled to the possession or to the receipt of the rents, issues and profits of his said *Wrightington* and *Parbold* estates, and who having attained his or her age of twenty-one years should be under his or her age of twenty-five years, an annual sum of 500*l.* until he or she should attain his or her age of twenty-five years, or depart this life under that age, and the said annual sum of 500*l.* to be paid by equal quarterly payments, and the first quarterly payment of the same to be made at the expiration of three calendar months next after he or she should so become entitled; and, in the next place, in trust to receive the surplus which should remain of the rents, issues and profits of the hereditaments and premises comprised in the said term of 2000 years, after answering the trusts and purposes aforesaid, as well during the minority and respective minorities of every person so for the time being entitled as aforesaid as during such time any child of

1849.

SCARISBRICK v. SKELMERSDALE.

his body so for the time being entitled as aforesaid should be under the age of twenty-five years, and to accumulate the same in manner thereinbefore mentioned, and at the end of any or every such period of accumulation to apply the fund so accumulated in or towards the payment of his funeral expenses, debts and legacies." By the 10th clause the testator directed his trustee out of the *Eccleston* estates to raise by sale or mortgage of the same, or a competent part thereof, sums for the payment of funeral expenses, debts and legacies and portions of 5000*l.* to the testator's fourth and every subsequently born son, and to each of his daughters, and subject thereto in trust for *Charles Eccleston*, his heirs, executors, administrators and assigns respectively. The 12th, 20th, and 25th clauses were as follows:—"And in the said settlement it shall be provided that, if any person for the time being entitled by virtue of the said settlement to the actual possession or receipt of the rents, issues and profits of any of the estates hereby directed to be settled shall be under the age of twenty-one years, the said *Edward Wilbraham Bootle* and *Streynsham Master*, and the survivor of them, and the executors, administrators and assigns of such survivor shall, so long as the person entitled as aforesaid shall be under the age of twenty-one years (but subject, and without prejudice, as hereinbefore mentioned), apply a competent part of the rents, issues and profits of the estate and hereditaments to which he or she shall be entitled as aforesaid for the maintenance and support of such person so entitled (unless the person so entitled be one of my said sons or daughters), and invest the residue in the name or names of the said *Edward Wilbraham Bootle* and *Streynsham Master*, or the survivor of them, or the executors, administrators or assigns of such survivor, in Government or real securities, so that the same during

1849.

SCARISBRICK v. SKELMERSDALE.

such minority or respective minorities as aforesaid may accumulate in the nature of compound interest; and at the end of each such period of accumulation, or sooner, if they or he shall think proper, shall call in and convert the said accumulated fund into money, and lay out and invest the same in the purchase of freehold, leasehold, and copyhold estates, to be situate in England or Wales, and settle the estates so to be purchased to the uses and in the manner in which I have by this my will directed the estates from the rents of which such accumulations shall have proceeded to be settled; but if any such purchase shall be made during the continuance of the period of such accumulation, the rents of the estates so to be purchased shall to the end of the period of accumulation be accumulated in the manner and for the purposes thereinbefore mentioned." 20th clause:—"And my will is also that in the said settlement there shall be inserted such limitations for preserving contingent remainders, such provisoes for the cesser of the terms to be thereby created such other powers of leasing, such powers for granting liberty to work mines and collieries, such provisions for the appointment of new trustees and for the indemnity of the trustees, and all such other clauses, powers, provisoes, agreements, and declarations not inconsistent with the general scope and true intent and meaning of this my will, as the said *Edward Wilbraham Bootle*, and *Streynsham Master*, or the survivor of them, or the executors or administrators of such survivor, or their or his counsel in the law shall think it advisable to insert for the advantage of the persons beneficially interested under the said settlement, or for explaining the same, as effectuating the general object and purport thereof." 25th clause:—"And whereas I have hereinbefore provided several funds for the payment of my funeral expenses, debts

1849.

SCARISBRICK v. SKELMERSDALE.

and legacies, among which debts I include all sums of money charged on my estates either by myself or any of my ancestors, or to which I am otherwise subject and liable; now I do hereby declare that the same shall be successively resorted to in the manner hereinafter mentioned, that is to say, as between strangers and my said trustees and the persons claiming under this my will, my said trustees or trustee for the time being shall have the fullest discretion and liberty to resort to the said funds in such order and course as they or he shall think proper; but that as between the persons severally claiming under this my will, the said funds shall be liable in the order and course of succession hereinafter mentioned, that is to say, such of my estates as are now charged with annuities shall be solely and exclusively subject to the payment of the same, and all such annuities or yearly sums for which I have given any security shall be solely and exclusively charged on the estates in respect of which they became payable respectively. But as to all my other debts and all my legacies, except those given by me to my said children, my said personal estate shall be the fund first to be resorted to; the said annual sum of 1000*l.* hereinbefore directed to be secured on my said *Scarisbrick* and *Halsall* estates for twenty years successively after my decease shall be the fund to be secondly resorted to; the rents, and profits of my *Wrightington* and *Parbold*, and my estate purchased from Mr. *Hill*, hereinbefore directed to be received by my trustees during such time as the child for the time being entitled to the actual possession thereof shall be under the age of twenty-five years, shall be the fund to be thirdly resorted to; the monies to arise from the sale of my *Eccleston* and *Sutton* estates, shall be the fund to be fourthly resorted to; the said term of 2000 years before directed to be created in my said

1849.

SCARISBRICK v. SKELMERSDALE.

Wrightington and *Parbold* estates and my estate purchased from Mr. *Hill* shall be the fund to be fifthly resorted to; and the said term of one thousand years hereinbefore directed to be created in my said *Scarisbrick* and *Halsall* estates shall be the fund to be sixthly and lastly resorted to. And as to the legacies first hereinbefore bequeathed by me to my said children, the funds provided for the payment of the same shall be resorted in manner hereinafter mentioned, that is to say, the money to arise from the sale of my *Eccleston* and *Sutton* estates, shall be the fund to be firstly resorted to; the term of 2000 years in my *Wrightington* and *Parbold* and the estate purchased from Mr. *Hill* shall be the fund to be secondly resorted to; and the term of 1000 years in my *Scarisbrick* and *Halsall* estates shall be the fund to be lastly resorted to. And as to the additional portions of 5000*l.* each, hereinbefore bequeathed by me to my children, the said term of 1000 years in my *Scarisbrick* and *Halsall* estates shall be the sole fund for the payment of the same. And as to the legacy of 10,000*l.* or such part thereof as shall eventually become raiseable under the trusts aforesaid, the said term of 2000 years in my said *Wrightington* and *Parbold*, and the estate purchased from Mr. *Hill* shall be the sole fund for the payment of the same. And, therefore, if any of the said funds shall be resorted to out of the order hereinbefore prescribed, the fund or funds first accessible shall replace, repair, or make good to the fund or funds so resorted to what shall have been so irregularly or out of order subtracted from such fund or funds respectively."

The testator died on the first of November 1809, without having had any other issue than the three sons and the four daughters mentioned in his will. *William*

1819.

SCARISBRICK v. SKELMERSDALE.

Eccleston the second son died without issue, and the other sons assumed the name of *Scarisbrick*. At the death of the testator, his third son *Charles Scarisbrick* was an infant nine years of age, and the trustees thereupon entered into possession of the *Wrightington* and *Parbold* estates, and continued in possession till *Charles Scarisbrick* attained the age of twenty-five. *Thomas Scarisbrick* died in 1833 without issue. The testator's daughter *Elizabeth* married *Edward Clifton*, and had an eldest son *Thomas Clifton*. By an order made by the House of Lords on the 24th day of July 1838, it was declared that, according to the true construction of the will of the testator in the events that had happened, *Charles Scarisbrick* had been since the death of *Thomas Scarisbrick* and still was entitled, in possession for his life, without impeachment of waste, to the *Wrightington* estates, and the *Eccleston* estates respectively. The first, second, and third funds provided by the testator for the payment of his debts and legacies were inadequate, and, therefore, considerable parts of the *Eccleston* estates were sold, and the debts and legacies paid; and the rents and profits of the *Wrightington* and *Parbold* estates had been accumulated to the amount of 32,000*l*. The remaining material facts appear in the arguments and judgment.

Mr. *Bethell*, Mr. *Rolt*, and Mr. *C. Hall*, for the Plaintiff.

The point in the will is this, whether a particular direction to accumulate is not void at common law, if the *Thellusson* Act had never passed. The testator made his will in 1806. He had three sons, *Thomas*, *William*, and *Charles*, the Plaintiffs in this suit. He seeks to have it declared that the money produced by the accumulation of rents of the *Wrightington* and *Parbold* estates, when he attained twenty-five, belongs to him. The

testator had also several daughters, and he was largely indebted. The scheme of his will was to settle the *Scarisbrick* estate on his eldest son, the *Wrightington* estate on the second, and the *Eccleston* estate to be sold to pay his debts and legacies, and subject thereto it was to be for the benefit of *Charles* and his issue; and then, by the accumulation of the rents of the *Wrightington* estate, the *Eccleston* estate was to be recouped. *William*, the second son, died without issue before the testator. *Thomas*, the eldest, died in 1833, also without issue. The principal point for consideration arises under the 9th clause, taken in connection with the 12th, 20th, and 25th clauses. Now the attempt here is to create a trust for accumulation, which *may* endure during the minorities of issue down to the remotest generation. The mode in which the fund is to be employed is not material. [They referred to *Browne* v. *Stoughton* (*a*).] A trust for a series of accumulations is bad without reference to the purpose of the accumulations. It may be urged on the other side, upon the case of *Lord Southampton* v. *Marquis* of *Hertford* (*b*), that there there was a trust for payment of debts, and it was held good so far; but in that case the trust was not to pay the debts out of the accumulations; the trust for payment of debts preceded the trusts for accumulation. But here the scheme is for one continuous unbroken accumulation of the rents for successive minorities. It is clear from the authorities that such a trust is void; the *Eccleston* estate is the only one to which resort is to be had for payment of debts.

They referred also to *Marshall* v. *Holloway* (*c*).

(*a*) 14 Sim. 369; Sug. Real. Property, 846, 347, *et seq.*

(*b*) 2 V. & B. 54.

(*c*) 2 Swanst. 432.

1849.

SCARISBRICK v. SKELMERSDALE.

Mr. *Rasch*, for the trustees.

Mr. *James Parker*, for *Edward Clifton* and his wife and *Thomas Clifton*.

The argument on the other side proceeds on a misapprehension of the terms of the will; it operates entirely by way of executory trusts. Further, the testator begins by a direction to carry out the purposes of his will, so far as the rules of law and equity will admit. If this Court had had to direct the carrying of the trusts into effect, it would have had no difficulty in separating what is good from what is bad. (He commented minutely on the language of the will, and proceeded.) In the 25th clause, the testator contemplates trusts which are severable from each other, and some of which are clearly good. So in the 9th clause, towards the end, the testator points out two distinct trusts; one is for any child of his until he shall attain twenty-five; that would have been clearly good if it had been the only trust. Then comes the clause relating to the minorities. He points out there several periods which are capable of being severed from each other; and though one of the trusts, unconnected with the others, may be tainted with remoteness, the other is not. We are doing no violence to the will of the testator in thus severing the trusts one from another. He referred to *Bankes* v. *Le Despencer* (*a*). This being a case of executory trusts, the Court will mould the will so as to make the trusts good so far as it can. *Browne* v. *Stoughton*, relied on by the other side, was not a case of executory trusts. The testator had created but one trust, and had mixed the directions so together that they could not be separated; the good could not be eliminated from the bad; but here there are clear and distinct trusts.

(*a*) 10 Sim. 576.

With him Mr. *Malins*, and Mr. *Toller*.

Even assuming this will to create trusts executed, the accumulation is good; for the trust of the term is a trust to pay debts—and a trust to pay debts was not before, and is not since the *Thellusson* Act, open to the objection of prolonged accumulation. They referred to *Ware* v. *Polhill* (*a*), and *Boyce* v. *Hanning* (*b*). They referred also to *Tollemache* v. *Coventry* (*c*), *Mackworth* v. *Hinxman* (*d*), *Longhead* v. *Phelps* (*e*), *Doe* v. *Selby* (*f*), *Crompe* v. *Barrow* (*g*).

Mr. *Bethell* replied.

The VICE-CHANCELLOR:

My notion is, that when the testator has directed a specific thing to be done, it must be done; and I cannot say that when he has used mere general expressions, as to what is to be done in the way of conveyance, these are to cut down what he has deliberately expressed; when the testator has directed, as he has done in the 9th clause, "as well during the minority," &c., as he has then expressly directed what should be the trusts during the minority of any person, not being a child, what he has directed must take effect; and if it is bad, that is, if it cannot take effect altogether, it must fail altogether; if the peccant part of the will is made a constituent part of it, you cannot strike that part out, but the whole fails; and that course in effect decides this case. It must be declared that the trust for accumulation is void, and that the fund in question belongs to the Plaintiff.

(*a*) 11 Ves. 257.
(*b*) 2 Cr. & Jerv. 334.
(*c*) 2 Cl. & Fin. 611.
(*d*) 2 Keen, 658.
(*e*) 2 W. Black. 704.
(*f*) 2 Barn. & Cress. 926.
(*g*) 4 Ves. 681.

1850:
22nd April.

Election.
Dower.

An annuity given to the testator's widow charged on estate *A.* in exoneration of estates *A* and *B.*, describing them; with power of leasing to the trustees.

Held, the widow was put to her election.

PEPPER *v.* DIXON.

IN this case the testator had by his will, describing his estates with reference to their locality, and not as his *estate* generally, given to his widow an annuity charged on a particular estate, with a power of distress, in exoneration of all the others; the estate charged was scarcely enough to pay the annuity, and would have been wholly insufficient if dower was taken out of it: subject to the annuity he devised his estates on trusts, and there were expressions in his will which showed that he considered his wife to have been amply provided for by his will. A power of leasing the whole of the land, was given to the trustees.

Mr. *Bethell* and Mr. *Renshaw*, for the Plaintiff, contended that the widow was put to her election.

The testator has given the trustees a power of leasing all the land, and he directs them out of the rents to pay the widow an annuity; if she also claims her dower, she will defeat the will, as dower is inconsistent with the power of leasing. The annuity is charged on a particular estate, which is quite insufficient if dower is to come out of it, and yet out of that estate the wife was as dowable as out of the rest; that shows that the testator intended to exclude her. Besides, the testator does not devise *his estate*, which it would be contended means his estate subject to the legal right of the wife to dower; but he devises the land by description. They cited *Grayson* v. *Drakin* (*a*), *Hall* v. *Hill* (*b*).

(*a*) 13 Jur. 145, and 3 De G. & Sm. 298.
(*b*) 1 Dru. & W. 94.

1850.

PEPPER v. DIXON.

Mr. *Blundell*, for the widow, relied on the observations of *Lord Eldon* in *Roadley* v. *Dixon* (*a*).

On the question of the power of leasing, he contended that it was not inconsistent with dower; as the trustees and the widow might join in leasing.

Mr. *Kinglake*, for other parties.

The *Vice-Chancellor* held, that as the power of leasing extended over the entirety of the lands, it was inconsistent with the enjoyment of dower, and that the widow was put to her election.

(*a*) 3 Russ. 200.

RE WREY'S TRUST.

1850:
15th January.
17th February.

Power.
Construction.
Execution.

Power to appoint by will, "to be signed and published by testator in the presence of and attested by three or more credible witnesses."

THIS case was argued on a petition presented under the Trustee Relief Act, in respect of a sum of 8300*l.* 3 per Cent. Consols, which had been paid into Court under that Act. On the marriage of *Bouchier W. Wrey* with *Sophia Bethell*, the sum of 8300*l.* 3 per Cent. Consols had been settled on trust for *B. W. Wrey* for life; remainder to his wife if she should survive him; remainder after the death of the survivor, in case there should be two or more children, as to one moiety of the said sum, to and among "all and every or any of the said

Testator made and published his will, which was signed by him in the presence of and attested by the three witnesses; but the attestation took no notice of the publication.

Held, that the power was well executed

1850.

Re WREY'S TRUST.

children, in such parts, shares, and proportions, at such ages, days, or times, and subject to such provisoes, conditions, and limitations as the said *B. W. Wrey* by any deed or deeds, instrument or instruments in writing to be sealed and delivered by him in the presence of and attested by two or more credible witnesses, or by his last will and testament, or any codicil or codicils *to be signed and published by him in the presence of and attested by* three or more credible witnesses should direct or appoint;" and in default of appointment, for such children share and share alike. *B. W. Wrey* made and published his will, which was signed by him in the presence of and attested by three witnesses, but the attestation took no notice of the publication of the will; and he gave thereby all his real and personal estate over which he had any power of appointment to his wife for life, with remainder to his son the Petitioner, *John Wrey*, and his four daughters, also Petitioners, equally.

Mr. *Bethell* and Mr. *Willcock* for the Petitioners, and Mr. *Lewin* for the Trustees of *J. Wrey's* settlement in the same interest, as to the execution of the power, contended that the will was a good execution of the power.

Mr. *Rolt* and Mr. *Daniell*, for the parties interested in default of appointment.

The will was not published; *Moodie* v. *Reid* (*a*), *Stanhope* v. *Keir* (*b*). The signature only was attested; the publication should have been also attested.

Mr. *Amphlett*, for the Trustees who paid the fund into Court.

(*a*) 1 Mad. 516; 7 Taunt. 355. (*b*) 2 Sim. & Stu. 37.

Mr. *Bethell* replied.

The question is, has the power been exercised; the circumstance that the attestation of the will says nothing about publication is immaterial; the will is found by the *Master* to have been published. He referred to *White* v. *British Museum* (*a*).

Wright v. *Wakeford* (*b*) was also cited.

The VICE-CHANCELLOR:

Two questions arise in this case: one on the execution of a power given to Mr. *Wrey* by his marriage settlement. The *Master* has found that the power is a power of selection, authorising the donor to make a selection of any child or any number of children; and the question is, was this power executed by the will of Mr. *Wrey*. (His Honor stated the will and the attestation). It is found by the *Master*, that he duly made and published his last will and testament. I cannot see what solid objection there is to the execution of the power. In *Stanhope* v. *Keir* a doubt was raised, whether the will was duly attested; but on looking at that case it seems remarkable that a doubt should be raised on that point, when the handing the will by the testator to the witnesses, was a direction to them to attest it. (His Honor referred to the case of *Wright* v. *Wakeford*, and observed that the case before him was free from the difficulty in that case, and he held the execution of the power a proper execution by the donee.)

The second question was one of pure construction, and affected no principle.

(*a*) 6 Bing. 310. (*b*) 17 Ves. 454.

1850:
27th May.

Will.
Construction.
Freehold Estate.

Devise to several for life; and, after the death of the surviving tenant for life, to a son of my nephew *A.* and his heirs and assigns, and, for want of such issue, over.

Held, that this was a gift in fee to the first-born son of *A.*

ASHBURNER *v.* WILSON.

JAMES ASHBURNER by his will, dated the 1st day of April 1794, devised certain freehold and customary estates to trustees, and after directing certain payments to be made out of the yearly rents thereof, directed the residue of such rents to be divided into five equal parts; one fifth to be paid to his nephew *Thomas Campbell* for life; one fifth equally between his nephews *Isaac* and *James*, and his niece *Jane Wilson*, for their lives; one fifth to his sister *Susannah Starkey* for life, and one fifth to his sister *Elizabeth Ashburner* and children, if she should marry and have any, for their lives, the share of any dying to go to the survivors or survivor; and on the death of the last survivor the testator gave and devised all his said messuages and premises as follows:—"To a son of my sister *Elizabeth Ashburner*, if she should marry and leave a son, his heirs and assigns; and for want of such issue, to a son of my niece *Margaret Starkey*, if she should marry and leave a son, his heirs and assigns; and for want of such issue, to a son of my nephew *James Wilson* in marriage, his heirs and assigns; and for want of such issue, to a son of my nephew *Isaac Wilson* in marriage, his heirs and assigns; and for want of such issue, to a son of my niece *Jane Wilson*, if she should marry and leave a son, his heirs and assigns; and for want of such issue, to a son of my nephew *Thomas Campbell* in marriage, his heirs and assigns." The testator died in July 1794, leaving his sisters and the nephews and nieces named in his will him surviving. *Isaac Wilson* and *Jane Wilson* died in 1796 and 1804 respectively, without issue. *Thomas*

Campbell died in 1809, leaving one son, *James Ashburner Campbell*. *Susannah Starkey* died in 1824, leaving a daughter, the testator's niece, *Margaret Starkey*, who died in 1833, leaving a daughter, now the wife of *Henry Attwell Smith;* and *Elizabeth Ashburner* died without issue in 1833. The testator's nephew, *James Wilson*, the last survivor of the tenants for life named in the will, died in 1839, having been twice married, and having had two sons by his first marriage, born respectively in 1805 and 1806, both of whom died infants and unmarried; and one son, *James Ashburner Wilson*, by his second marriage. *James Ashburner Wilson*, the Plaintiff in the present suit, in the events which had occurred claimed to be entitled under the devise to "a son of my nephew *James Wilson*, his heirs and assigns,' to the fee-simple of the estates devised by the will.

Mr. *Bethell*, Mr. *James Russell*, and Mr. *Milne*, for the Plaintiff.

The effect of the devise was, either an estate in fee to any son of *James Wilson*, in which view the Plaintiff takes in the events which have happened, as such designated person; or it was an estate tail to *James Wilson*, in which case, the Plaintiff takes as issue in tail. (They cited *Byfield's* case) (*a*). The words here are identical with the words in that case, with this only difference, that here there are the words the "heirs and assigns," but that would make the estate first given an estate in fee. (They referred also to *Robinson* v. *Robinson* (*b*).) According to that case, *James's* estate was an estate tail.

They referred to *Mellish* v. *Mellish* (*c*). That case

(*a*) See Ventris, 231.
(*b*) 1 Burr. 38, and 2 Ves. sen. 225.
(*c*) 2 Barn. & Cress. 520.

1850.

ASHBURNER v. WILSON.

shews that the word son must be taken as *nomen collectivum*, and as including the sons of sons. You must here hold the word son as not only meaning all the sons, but grandsons and great grandsons, so that it becomes a word of limitation, and then merging with the gift to the father, creates an estate tail in him. They cited also *Seward* v. *Willox* (*a*), *Doe* v. *Garrod* (*b*).

Mr. *Malins*, and Mr. *Tripp*, for one of the co-heiresses of the eldest son of *James Wilson*, the last tenant for life.

The devise was, in effect, to *James Wilson* for life, with remainder to his *first born son* in fee. It is true that if there is a devise to *A.*, remainder to his son, and the will shows an intention that all the sons are to take, that is an estate tail in *A.* But that cannot be the intention here, by reason of the addition of the words "his heirs and assigns." The cases cited, *Robinson* v. *Robinson*, and *Mellish* v. *Mellish*, go upon this, that the word son is a word of limitation where there are no words of limitation added to the limitation to the son; the words of limitation superadded here, distinguish this case; after *James's* death it is to go to his *son, his heirs and assigns*, and if *James* never had a son, it was to go over.

They referred to *Loddington* v. *Kyme* (*c*), *Carter* v. *Barnardiston* (*d*).

Primâ facie, the word son is always a word of purchase, and it is only a word of limitation where the general intention cannot otherwise be effected. When words of limitation are superadded to the limitation to the son, the word son is always held to be a word of purchase. The whole fee, therefore, vested in the son of

(*a*) 5 East, 198.
(*b*) 2 Barn. & Adol. 87.
(*c*) 1 Salk. 224.
(*d*) 1 P. Will. 294, n.

James, and on his death it descended to his co-heirs. They referred also to *Lees* v. *Mosley* (*a*), to show that even issue is a word of purchase *primâ facie;* and even "heirs of the body" may be words of purchase if words of limitation are superadded: *Right* v. *Creber* (*b*), *Doe* v. *Selby* (*c*).

Mr. *Stuart* and Mr. *Elderton,* for the Trustees.

Mr. *Lloyd* and Mr. *Phillips,* for another co-heir of the testator.

After giving life estates, the testator proceeds to dispose of the inheritance. And there is a marked difference between the limitation to the females and to the males. The word son is a word of purchase. The words of gift over, for want of "such issue," mean for want of a *son* of the nephew. In *Byfield's* case there were no words of limitation superadded to the limitation to the son. In *Robinson* v. *Robinson,* the main difficulty was in implying an estate tail, notwithstanding the gift to the father for life and no longer. In *Mellish* v. *Mellish* there were no superadded words of limitation to the gift to the son. They referred to *Blackburn* v. *Stables* (*d*) and *Douset* v. *Sweet* (*e*).

Mr. *Bates,* for the representative of one of the testator's co-heirs, contended the will was void for uncertainty; the words "a son" do not designate what son: they are too uncertain a description of the donee.

Mr. *Bethell,* in reply.

It has been contended, that the limitations after the

(*a*) 1 You. & Coll. Exch. 589.
(*b*) 5 Barn. & Cress. 866.
(*c*) 2 Barn. & Cress. 926.
(*d*) 2 Ves. & B. 367.
(*e*) 1 Amb. 175.

1850.

ASHBURNER v. WILSON.

life estates are contingent remainders. That is not so; they are executory devises, not contingent remainders; and not to any son who might be born, but to a son who shall be left living by the parent.

The VICE-CHANCELLOR referred to the first part of the will, and continued—

Then follows the devise, which is the subject of the question in this case. It is not necessary to determine whether the daughters took a legal fee; the testator has directed that after payment of his debts, his estate shall go amongst five persons, including *Elizabeth Ashburner*, if she did marry and have children, and then comes the disposition on which the question turns. (The *Vice-Chancellor* read the limitations set out in p. 204.) Then what are the facts? The two ladies named never had any children. *James Wilson* had two sons by one marriage, both of whom died, and one son by another who survives. And the sole question is, what estate was to be taken by a person described as a son of *James Wilson*. None of the cases cited apply; for the only question is, what the testator meant by a son of a nephew, his heirs and assigns; he speaks only of one son. He meant, if there was a son he should take; that is, the first son should take, and then there was end of all further limitation. I think the will admits of no construction, but that which gives an estate in fee to the eldest son of *James Wilson*, and those who represent him are entitled.

The declaration was, that the estate was a contingent remainder, which vested in the first-born son of *James Wilson* in fee; so that the co-heirs of the son of *James* were entitled.

HAMBROOK *v.* SMITH.

1852: 15th January.

Pleading. Exceptions.

An interrogatory embracing two points; as to one, it was answered; as to the other, not—an exception to the whole may be sustained. Where deeds existed, in which, in the event of the Court deciding one way, the Plaintiff would have no interest, but if it decided another way, he would,—the Defendant cannot protect himself against discovering in whose possession they are; nor can he, because discovery might have the effect of making the estate go over away from him.

BY indentures of the 29th and 30th days of November 1832, being a voluntary settlement made by *Samuel Smith*, the husband of *Elizabeth Smith*, certain real estate was conveyed to a trustee upon trusts for the benefit of *Elizabeth Smith* during her life, and after her death to such uses as she should appoint by her will; and in default of such appointment, in trust for *Mary Hambrook*, her heirs and assigns for ever. In the year 1845 *Samuel Smith* prevailed upon the trustee to reconvey the estate to him, his heirs and assigns. In April 1848 *Elizabeth Smith* died, having by her will appointed that all the hereditaments comprised in the said indentures of 1832 should remain and be to the use of her husband during his natural life, or until he should be found or declared a bankrupt, or should take the benefit of any Act for the relief of insolvent debtors, or convey, or assign, or incumber his aforesaid life estate or interest, or any part thereof, by way of anticipation, and after the decease of her said husband, or other sooner determination of his aforesaid estate or interest, then to other persons mentioned in the will. *Mary Hambrook* died in 1846, leaving *Samuel Smith Hambrook* her heir, who filed his bill on the 22nd day of March 1851, against *Samuel Smith* and others, stating as above mentioned, and alleging that the will of *Elizabeth Smith* was invalid, and that he was therefore entitled to the hereditaments under the indentures of 1832, as in default of appointment, and alleging that immediately upon the death of his wife *Samuel Smith*

1852.

HAMBROOK v. SMITH.

obtained possession of the deeds of 1832, and still retained possession of them, and praying a conveyance of the estate and delivery up of the deed. The bill contained the following interrogatories:—"Whether the said *Samuel Smith* did not at the time of the death of his said wife or at some other time, and when, obtain possession of the said indentures of settlement of November 1832, and the other title deeds hereinbefore in that behalf mentioned, or of some and which of the same respectively, and whether he does not now retain such possession, either by himself or by his solicitors or agents, or some one of them or otherwise, or in whose possession are the same now, and in what right?" "And, that the said *Samuel Smith* may set forth a list and schedule of the title deeds and muniments of title relating to the hereditaments the subject of the said settlement of 1832, and if he shall allege himself to have parted with the possession of the same or any of them, then that he may state what hath become of such of the same the possession of which he shall have parted with, and in whose possession, custody, or power the same now are, and under what title respectively." The Defendant, *Samuel Smith*, by his answer, admitted, that at the time of, or very shortly after the death of his said wife, he did obtain possession of the indentures of 1832, and he set forth a schedule of the deeds in his possession, and said that he had at one time in his possession some other title deeds and muniments of title relating to the said hereditaments, and that before the institution of this suit he parted with them. He submitted, and insisted that he ought not to be compelled to state what had become of the same, or in whose possession, custody, or power they were, inasmuch as he was advised and believed, that having regard to the terms of the trust in the Defendant's favour, contained

in the said will, such discovery would or might subject him to forfeiture and loss of his interest in the said hereditaments under the said will. To this answer the Plaintiff took two exceptions; the first, relating to the first interrogatory stated, the second exception to the second interrogatory.

Mr. *Goodeve*, in support of the exceptions.

Mr. *Chandless* and Mr. *Surrage*, for the answer. They argued thus: the exceptions were bad in form, as each of them comprised an interrogatory which had been in part answered, and the exceptions extended in fact over more than one interrogatory. Further, they said that if a Defendant's answer may expose him to forfeiture, he is not compelled to answer; and here the effect of the discovery might be forfeiture; if it be said this is not properly forfeiture, but a limitation over, we say forfeiture merely means loss of an estate in case something is done. They cited *Monnins* v. *Monnins* (*a*), *Wrottesley* v. *Bendish* (*b*), *Chauncey* v. *Tahourden* (*c*), *Lucas* v. *Evans* (*d*), *Short* v. *Mercier* (*e*), *Stainton* v. *Chadwick* (*f*), *Adams* v. *Fisher* (*g*), *The Attorney-General* v. *Thompson* (*h*), *The Attorney-General* v. *Strutt* (*i*), *Bute* v. *The Glamorganshire Canal Company* (*k*), *Glover* v. *Hall* (*l*), *M'Hardy* v. *Hitchcock* (*m*).

Mr. *Goodeve*, in reply.

As to the form of the exceptions by the General

(*a*) 2 Ch. Rep. 68.
(*b*) 3 P. Wms. 235.
(*c*) 2 Atk. 392; *Chancey* v. *Fenhoulet*, 2 Ves. 625.
(*d*) 3 Atk. 259; Hare Disc. 146.
(*e*) 3 Mac. & G. 205; 15 Jur. 93.
(*f*) 15 Jur. 1139.
(*g*) 3 My. & Cr. 526.
(*h*) 8 Hare, 106.
(*i*) 3 Beav. 396.
(*k*) 1 Ph. 681.
(*l*) 2 Ph. 484.
(*m*) 11 Beav. 73, and Mit. Plead. 311, 5th Ed.

1852.

HAMBROOK v. SMITH.

Orders, the interrogatories are numbered, and each interrogatory should have an exception to the whole of the answer to it, besides which an exception to one interrogatory would not be intelligible if it stood alone. Both parties claim a common interest in many of these deeds. The Defendant must answer fully. *Ovey* v. *Leighton* (*a*), *Portarlington* v. *Soulby* (*b*), *Duncombe* v. *Davis* (*c*). As to the forfeiture, the authorities do not make out the positions laid down on the other side. The observation in *Stainton* v. *Chadwick* was merely a dictum. *Adams* v. *Fisher* does not apply. The distinction between a condition and a conditional limitation may be absurd, but it is well established. But the question of forfeiture has nothing to do with it, as we claim in spite of the will. He has obtained the legal estate, and the deeds as trustee, and ought to produce them.

VICE-CHANCELLOR KINDERSLEY:

The first question raised upon these exceptions is, whether they are good in form. It is contended, on the part of the Defendants, that they are bad in form in this respect, that such exceptions embrace more than one interrogatory; and inasmuch as one of the interrogatories embraced in the exception, has been sufficiently answered, even if the other has not been sufficiently answered, the exceptions ought to be altogether overruled. Now, as to the effect of such exception embracing more than one interrogatory. The first interrogatory is (the *Vice-Chancellor* referred to it and to exceptions). Now, it is said that the first exception embraces two interrogatories; one is, whether he did not, at the time of the death of his wife, obtain possession of the deeds;

(*a*) 2 Sim. & St. 234. (*b*) 7 Sim. 28.
(*c*) 1 Hare, 184.

1852.

HAMBROOK v. SMITH.

and the other is, in whose possession are they? In one sense, these are two questions, but they are properly embraced in one interrogatory, because it is all one interrogatory, whether the documents did not come into his possession at the death of his wife; and if they are not in his possession, in whose possession are they? It appears to me that there is no impropriety in embracing the whole of that in one interrogatory, and no impropriety in embracing it in one exception, though a portion has been answered. The same observation applies to the second exception, and, therefore, there is no valid objection in form. The next question is this: the Defendant insists that having the discovery sought here would not in any way assist the Plaintiff in obtaining a decree when the cause comes on for hearing; and for that reason, besides the other, the Plaintiff ought not to be allowed to compel the Defendant to answer. Now the question has been argued as if the discovery sought was what the deeds were. But the discovery is not what the deeds were, nor the setting out a schedule, because the Defendant has set out a schedule; but the discovery sought is, in whose possession are the documents now and in what title? Now it is said, and said very truly, that inasmuch as the Defendant is entitled to this property, if the will of the testator's wife is a valid will, and that if the question be decided against the Plaintiff, he will have no relief whatever at the hearing. But I need not say whether that question will be determined at the hearing in favour of the Plaintiff or not. But supposing it should be determined in favour of the Plaintiff that the will is invalid, then is there not relief asked, which the Plaintiff would be entitled to at the hearing, for the purpose of obtaining which, the discovery here sought is, or may be immaterial? The Plaintiff asks that the estate may be given up to him,

1852.

HAMBROOK v. SMITH.

and that the deeds may be delivered to him, in order to found a claim to the relief. The facts stated are these: that the Defendant made a voluntary settlement of certain real estate, by which he conveyed that real estate to a trustee, named *Davis*, in trust for the separate use of the settlor's wife for life, with a power of appointment by will, and in default of appointment, to the mother of the Plaintiff in fee, the Plaintiff being her son and heir, and therefore entitled to such estate, as she, if living, would have been entitled to. It appears that the wife of the Defendant, purporting to exercise the power of appointing the property by will, under the settlement, made a will by which she appointed the estate to the Defendant *Smith*, during his life, or until he should alien the estate by bankruptcy or otherwise; and on the determination of that estate to the other Defendants, the brothers and sisters of the Plaintiff; and it appears that, on the death of the Defendant's wife, he, by virtue of that testamentary appointment, entered into possession, and he procured *Davis*, the trustee, to convey estate to him. Now, when the cause comes on to be heard, the Court will first have to determine the question as to the validity of the appointment. If it determines that it is invalid, the Plaintiff's bill must be dismissed; but if the will is held to be valid, what will the Court have to determine? Why, the Court must then decree a conveyance of the estate and delivery of the deeds of the estate to the Plaintiff. Now, upon the exceptions, it is no protection against answering to say that, in one event of the decision of the Court, you will be entitled to no discovery at all. If a discovery may be useful for obtaining any relief which the Plaintiff may obtain, I apprehend, in that case, the Plaintiff is entitled to a discovery; and here it may be most material to the Plaintiff to have a discovery of the hands in which the

deeds now are. It may be material even before the cause comes to a hearing, because it may be necessary to make the person in whose hands the deeds are a party, in order to get a decree for that party to give up the deeds; and if it were not for the question that arises as to a forfeiture, I should have considered it a clear case, and that the Defendant was bound to answer in whose custody the deeds are. These deeds are, in fact, the foundation of the title of both parties; and I apprehend there would be no doubt, subject to the question of forfeiture, but that the Defendant would be bound to set out all the deeds remaining in his possession, and that the Plaintiff would be entitled to production; and indeed the Defendant has set out a schedule of the deeds in his possession. If he, having got the legal estate from the trustees, has parted with the deeds to a third party, then is he not compelled to state to whom he has parted with the deeds. All the cases cited by the Defendant are cases relating to production except the case of *Stainton* v. *Chadwick* Now, the principle on which the Court proceeds, as to compelling a party to set out deeds, and also as to the application for their production, is this: If the Plaintiff's title is positively disputed by the Defendant, and the documents in question could not in any way assist the Plaintiff in any relief he is to ask for at the hearing, the Court may not only not compel production, but may not require a schedule of them. But if the documents may assist the Plaintiff in obtaining any portion of the relief which in any one event he may become entitled to, there the party is entitled to discovery by having the deeds set out, and also to production, subject only to this, that, if the Court sees upon motion for production that there is a point to be deter-

1850.

HAMBROOK v. SMITH.

mined upon which the title of the Plaintiff depends, and which the documents will not help, then the Court may say, in this stage of the cause, the Court will not compel production. Now, as to the case of *Stainton* v. *Chadwick*, I conceive that the dictum of the *Lord Chancellor* must have reference to documents which would be necessary in case the Plaintiff obtains a decree, in order upon some consequential proceeding to work out the relief he asks. I am of opinion that really if there were not this question arising as to forfeiture or loss which the Defendant may sustain in giving the discovery, there would not be a reasonable doubt as to the right of the Plaintiff to have the discovery, and that brings me to the question as to the forfeiture. Now that stands thus:—The Defendant says this will of the wife, which he has a right to assume for this purpose will be, or at least may be, a valid testamentary appointment, has made the Defendant's life estate dependent upon his not alienating, that is to say, has made his estate cease upon alienation, and go over to other persons; and he says, if I disclose to the Plaintiff the hands in which I have placed these deeds, I shall forfeit this estate, because it may shew or tend to shew that I have done an act, on the doing of which my estate was to determine. Now the case of *Monnins* v. *Monnins* (*a*) no doubt seems to have decided this, that, when an estate is given to a woman durante viduitate, and where it was only to endure so long as she remained a widow, that she might protect herself from answering as to the fact of whether she had contracted a new marriage. On the other hand, there are other cases referred to, the case before Lord *Talbot*, cited in 2 Atk. 393, and other cases, which go to shew clearly this, that the Court draws a distinction between these two

(*a*) 2 Ch. R. 68.

classes of cases: the one, where a certain estate is given to an individual, but with a condition annexed, that upon the happening of a certain event there shall be a forfeiture of the estate so given; the other, that an estate is so limited as only to endure till a certain event occurs, and then to go over; no doubt in many cases that is so, and the distinction is fine, but well established, not only as to discovery, but as to many other questions. The latter is called a conditional limitation. I doubt the correctness of that; but I understand it to mean that the estate is limited to endure until a certain event happens, and then to go over—that appears to me to be the meaning of the term. Now in this case, according to the terms of the will of Mrs. *Smith*, the estate is given to him not absolutely for life, but to endure only until the happening of the event of alienation, and then given over to other persons. Now it would be very difficult in a Court of Equity to maintain the proposition that a man has a right to say, although I am in possession of an estate which was only to endure till the happening of a certain event and then to go over, I can in equity and moral justice refuse to disclose whether that event has happened, upon the happening of which my estate is to determine. If there had been no decision upon the point I could not have satisfied myself that he could have protected himself from giving such discovery, when the refusal in effect is saying this: "Although my estate has determined in consequence of the act, I have a right to refuse the disclosure whether my estate has determined." I should find it extremely difficult to hold this; but I think the decisions clearly establish that this is not a case of forfeiture to which the rule applies. Now the cases which have been cited, except that of *Monnins* v. *Monnins*, which appears to be overruled by subsequent cases, seem to have determined

1850.

HAMBROOK v. SMITH.

that there is a distinction between cases of estates to endure for life, but to go over in case of a particular act being done, and cases of estates to endure until the happening of a certain event. I am clearly of opinion, therefore, that the objection to discovery on the ground that it might subject the Defendant to what he calls forfeiture, but which is only the discovery of the happening of that event on which the estate would determine, is not tenable. I must consequently overrule the exceptions.

1850: 3rd & 4th May.

Principal and Surety.

A. covenanted to convey to *B.* certain property free from incumbrances, except such as were set forth in a schedule, in consideration of *B.* and *C.*, as his surety, doing certain things. It turned out that the property was charged with another incumbrance, of which *C.* had no actual knowledge, *A.* having forgotten that it existed.

WILLIS *v.* WILLIS.

IN this case *Richard Willis* contracted to convey certain real and personal estates to *George Willis*, subject to certain specified charges, in consideration of *G. Willis* and *Arthur Willis*, as his surety, consenting to pay to the executors of *R. Willis* a sum of 2000*l.*, and to pay to him and his wife certain annuities. At the time of this transaction there was a mortgage on the property not included in the specified list. On this fact becoming known, *G. Willis* paid the mortgage, and he then refused to make further payments of the annuities to *R. Willis*, who thereupon brought his action against *G. Willis* and *Arthur Willis*.

Arthur now filed his bill, and moved to stay the action. The answer of *R. Willis* admitted that *Arthur* had no actual knowledge of the mortgage, and alleged that he himself had at the date of the mortgage to *G. Willis* forgotten its existence.

Held, that *C.* was discharged from his liability as surety.

1850.

WILLIS v. WILLIS.

Mr. *Bethell* and Mr. *Hardy* moved for the injunction.

The contract of suretyship proceeded on the footing of there being no incumbrance on the property. It turns out that *Richard* had mortgaged it. He by his answer says he had forgotten it; but what equity can arise to him from forgetting what it was his duty to remember? The Plaintiff dealt with *Richard* on the footing that there was no charge beyond those specified; *Richard* was bound to remember what charges there were. The schedules to the deed contain what purports to be an account of the property, and what was its state; and it is conveyed free from all incumbrances, except those stated in the schedule. The answer admits that if he had not forgotten the mortgage, it would have been included in the schedule. They cited *Pidcock* v. *Bishop* (*a*), *Stone* v. *Compton* (*b*), *Bonser* v. *Cox* (*c*).

Mr. *R. Palmer* and Mr. *Baily*, against the motion.

The case made by the bill is one of personal fraud and misrepresentation against *Richard Willis*; no such case is borne out by the answer.

They referred to *Wylde* v. *Gibson* (*d*). Besides, the Plaintiff may set up his defence at law: *North Eastern Railway Company* v. *Martin* (*e*). And the means of the Plaintiff to obtain information were as ample as those of the Defendant. This is not a case of concealment, but of ignorance of both parties, each of whom was as able to ascertain the truth as the other.

Mr. *Bethell* replied.

It is said the Plaintiff could set up his defence at law.

(*a*) 3 Barn. & Cress. 605.
(*b*) 5 Bing. N. C. 142.
(*c*) 4 Beav. 379.
(*d*) 1 H. of L. Cas. 605, (N. S.)
(*e*) 2 Phil. 758.

1850.

WILLIS v. WILLIS.

How could a fraudulent concealment be pleaded in bar in an action brought in the Court of law? It could not be pleaded after execution of the deed; besides, if that were so, this Court has concurrent jurisdiction. As to the Plaintiff having the means of shewing the existence of the mortgage, the deeds proceeded on the assumption that there was no such incumbrance, and the words of the contract are the measure of the obligation.

The *Vice-Chancellor* said that the language of the answer was such as to make it doubtful whether the Plaintiff had actually known that which, if he had known it, would have deprived him of his equity. His Honor's opinion was, that if, when the contract was made between the principal and surety, both parties were in a state of ignorance, which was admitted in the answer, it must be taken to be the same as if, in administering equity between the parties, the principal was in a situation, which bound him to communicate a fact which the surety had forgotten. It never could be said that, because both had forgotten it, the surety should not be placed, as against the Plaintiff in the action, in the same situation in which he would have been, had he known it. Inasmuch as the Defendant admitted in his answer that the surety had no knowledge of, and he himself had forgotten the incumbrance, the case must be taken as if he had made out that the Plaintiff at law had knowledge which he ought to have communicated to the Plaintiff in equity, and therefore the injunction must be granted.

IN RE WEBBER'S SETTLEMENT.

1850.

Deed. Construction.

Trust under *a deed*, for such person or persons as, at the time of the death of *A.*, shall be the next of kin of *B.*, his wife, and would be entitled to her personal estate, as if she had died sole and unmarried.

B. died in the lifetime of *A.*, having five brothers; four died in the life of *A.*

Held, that the surviving brother alone was entitled.

THIS was a petition of *Thomas Webb*, asking for a transfer of 385*l.* Consols, which had been paid in under the Trustee Act under these circumstances:—Upon the marriage of Mrs. *Webber*, who was the sister of the Petitioner, the sum in question was vested in trustees in trust for Mrs. *Webber* for life for her separate use, with a power of appointment, and in case she died in her husband's lifetime without having appointed, in trust for Mr. *Webber*, her husband, for his life, and then the trustees were to stand possessed of the fund under these words—"In trust for such person or persons as at the time of the death of *John Webber* (the husband) shall be the next of kin of the said *Anne Webber*, and would be entitled to her personal estate and effects, his, her, and their executors, administrators or assigns, as if she had died sole and unmarried." *Anne Webber* died in her husband's lifetime without having appointed, and leaving five brothers, four of whom died in the lifetime of the husband, leaving the Petitioner, *Thomas Webb*, the sole survivor at the husband's death, but leaving also children of the deceased brothers; and the question then arose, whether *Thomas Webb*, under the above clause, was solely entitled, or whether the fund was divisible between him and his nephews and nieces under the Statute of Distributions; in consequence of which doubt the trustees had paid the money into Court, and this Petition was by *Thomas Webb* as sole next of kin, praying payment out to him.

Mr. *Stuart* and Mr. *G. L. Law* appeared in support

1850.

In re WEBBER'S SETTLEMENT.

of the petition, and cited *Elmsley* v. *Young* (*a*), *Withy* v. *Mangles* (*b*).

Mr. *Rogers* and Mr. *Prior* opposed the petition, and argued that the case was perfectly distinguishable from the authorities cited. The wording of the latter part of the clause had a clear reference to the statute. If the Petitioner could even claim anything under the first part of the clause, the nephews and nieces certainly came under the second part, which shews that the words next of kin must be taken in their ordinary statutory sense.

Mr. *Follett* appeared for the trustees.

The *Vice-Chancellor* said, that the rule in construing a deed (which this was) was, that the first words were the controlling ones; and if, therefore, the second portion was inconsistent with the first, it must be disregarded. This was argued as if it had been a will, but being a settlement, the construction contended for by the respondents could not be put upon the clause without cutting down the first words, which could not be done. The order must be made as prayed—the costs out of the fund.

(*a*) 2 Myl. & K. 82—78 (*b*) 4 Beav. 358.

AN

INDEX

TO THE

PRINCIPAL MATTERS.

COMPANY.

CONSTRUCTION.

CONTRIBUTORY.

COSTS.

CREDITOR'S SUIT.

DEBT.

DEBTOR AND CREDITOR.

EXONERATION.

FREEHOLD ESTATE.

GUARDIANS OF THE POOR.

HEIR-LOOMS.

IMMORAL CONSIDERATION.

IMPERTINENCE.

INFANTS.

INJUNCTION.

POWER.

POWER OF SALE.

PRACTICE.

PRINCIPAL AND AGENT.

PRINCIPAL AND SURETY.

PRIORITY.

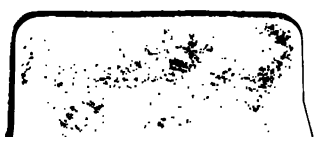
VESTING.

VICE-CHANCELLOR OF ENGLAND.

VISITOR.

WILL.

LONDON:
PRINTED BY WILLIAM STEVENS, 37, BELL-YARD,
LINCOLN'S-INN.



VESTING.

VICE-CHANCELLOR OF ENGLAND.

VISITOR.

WILL.

LONDON:
PRINTED BY WILLIAM STEVENS, 37, BELL-YARD,
LINCOLN'S-INN.